Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

GEORGE DAVID ATKINS,

Petitioner,

v.

COLTEC INDUSTRIES, INC., f/k/a COLT INDUSTRIES, INC., and STEMCO, INC.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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95 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether The Court's Opinion in *St. Mary's Honor Center v. Hicks* requires a showing of "pretext-plus" in an employment discrimination case as suggested by the Fifth, First and Tenth Circuits or whether a finding of "pretext-*only*" may permit a jury to infer that unlawful discrimination occurred as determined by the Second, Third, Fourth, Sixth, Seventh, Eighth and Ninth Circuits.

2. Whether in the instant case, the jury's rejection of the employer's stated reason for discharge, coupled with the employer's mendacity, and bolstered by anecdotal testimony and statistical age bias in the "force reduction" satisfied The Court's proof requirements in *St. Mary's Honor Center v. Hicks.*

3. Whether a victim of age discrimination could ever survive review in the Fifth Circuit with the "pretext-plus" requirement, particularly considering the circuit court's rejection of the significant proof in this case.

4. Whether the Fifth Circuit erred in its interpretation of *St. Mary's* as applied to this case.

LIST OF PARTIES

The undersigned counsel of record certifies that the following persons have an interest in the outcome of this case.

(A) George David Atkins, Petitioner;

(B) John E. Wall, Jr., Counsel for Petitioner;

(C) Coltec Industries, Inc., f/k/a Colt Industries, Inc. and Stemco, Inc., Respondents;

(D) Mark E. Schwartz, Steven L. Rahhal, Andrews & Kurth, Counsel for Respondents.

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OPINIONS BELOW

Suit was premised on Petitioner's claims brought under the Age Discrimination in Employment Act (ADEA) after he was terminated from Respondents' employ. Following a jury trial, the jury found Petitioner's termination was in violation of the ADEA and awarded damages. In an opinion dated June 18, 1993, the United States District Court for the Northern District of Texas, Dallas Division, A. Joe Fish, presiding, granted Respondents' motion for judgment n.o.v. This unpublished opinion is printed here as Appendix B. The district court

stated that Petitioner's circumstantial proof of age discrimination was not sufficient to rebut Respondents' legitimate reasons for the reduction in force which resulted in Petitioner's termination.

Petitioner timely appealed this decision to the United States Court of Appeals for the Fifth Circuit. On August 18, 1994, the United States Court of Appeals for the Fifth Circuit affirmed the ruling of the district court. This Fifth Circuit opinion was unpublished under the provisions of its Local Rule 47.5, and is printed here as Appendix A. The Fifth Circuit affirmed stating that the evidence presented at trial overwhelmingly demonstrated that the Respondents did not discriminate against Atkins on the basis of his age. In making this determination, the Fifth Circuit relied on its "pretext-plus" interpretation of *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742 (1993), and ignored the uncontroverted evidence of pretext and Respondents' serious credibility problems at trial.

JURISDICTION

This Petition seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit made and entered on August 18, 1994. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Petition for Writ of Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

Petitioner, David Atkins ("Atkins"), was hired by the Respondents, Coltec Industries, Inc. f/k/a Colt Industries, Inc., and Stemco, Inc. ("Stemco"), in July of 1989. Atkins was hired to dramatically increase sales in a product line owned by Stemco which was known as "Auto-Coach On Board Computer System." (vol.4 pp.34-35) The system is installed in commercial trucks so as to enable the owners or managers of the trucks to monitor such things as shift speeds, idle time, maximum speeds and vehicle velocity. (vol.4 p.75) The product is a management tool so as to enable or assist in reduction of transportation expenses. (vol.5 p.35) On an annual basis, the product was reputed to save one vehicle owner $9,000,000.00 annually if utilized properly. Atkins, when hired, was assured he had 3 years in which to turn the operation around (vol.5 p.44) Part of the 3 year time period was needed for large sale gestation. (vol.5 p.45) The anticipated gestation period for a large sale was 6 to 18 months. (vol.5 p.45) Later, Atkins and Roger Marksberry, along with an outsider by the name of Jerry McCombs, contemplated a "management buyout" of the company from Coltec Industries. (vol.5 pp.46-49) The concept arose around the time Mr. Henry Thiel left his position as CEO with Coltec, and when Mr. John Guffey ("Guffey") assumed the responsibility of CEO for Coltec Industries, Inc. (vol.5 pp.46-49)

Prior to Atkins' termination, Guffey had asked Atkins to evaluate the financial ramifications of: (1) selling the business; (2) closing the business; or (3) reorganizing the operation to reduce the losses and create hopefully some profit. (vol.5 pp.49-50) Atkins, Marksberry

and Jerry McCombs were organizing a plan to achieve a "management buy-out" with Coltec financing the purchase. (vol.5 pp.49-50) A number of meetings were held with Guffey in late 1989 and early 1990 to discuss this buy-out. (vol.5 pp.49-50) As close as two (2) weeks before Atkins and his group were to purchase the product line, a meeting was conducted with Guffey. (vol.5 pp.51-52) During the meeting, Guffey commented to Atkins that with the cash flow of the company being negative, an easy way to reduce the negative cash flow was to eliminate older workers. (vol.5 p.51) Guffey even boasted to Atkins that he had successfully achieved such unlawful activity in "union shops." (vol.5 p.51) This meeting occurred approximately two (2) weeks prior to Atkins' and the other older employees' elimination from the work force. (vol.5 p.52) The reduction occurred February 14, 1990. (vol.5 p.53)

Atkins, Marksberry and McCombs, arranged to meet with Guffey on February 14, 1990 under the assumption that they were going to close the management buy-out deal or obtain further closing instructions. (vol.5 p.53) Rather than consummate the transaction, Guffey terminated Atkins, Marksberry and many other people without any prior notice. (vol.4 pp.29-30 and vol.5 p.54) Guffey told Atkins that Coltec was going to close the operation down. (vol.5 p.53) The evidence revealed that the company was not closed down, and that many younger employees were retained. The evidence also showed that several other younger employees were terminated and then quickly rehired, specifically, Chris Johns and Petra Rhode. The evidence showed that Johns was a younger, much less experienced employee than Atkins.

Contrary to the stated reason for discharge, at trial, Stemco claimed that it had reorganized and reduced the work force so as to reduce expenses. This general reduction in work force was statistically oriented and demonstrated clearly that it was age biased. (vol.5 pp.59-62) Specifically, forty-percent (40%) of the work force pre-layoff was 40 or older. (Plaintiff's Ex. 144) The following day only 13% of the work force was 40 or over. (Plaintiff's Ex. 145) The median age of those laid off was a little over 40 years. (vol.5 p.62) The median age of those retained was 33 1/2 years. (vol.5 p.62) The so-called reduction in work force was followed by the reinstatement of some of the younger workers who were under 40 years of age. (vol.5 pp.63-64) One employee who was included in the "reduction in force" did not receive retirement despite his 25 years of tenure until after Atkins filed a charge of discrimination with the Equal Employment Opportunity Commission. (See Defendant's Ex. 39 and vol.5 p.71) Fifty-seven percent (57%) of terminated employees were over 40. (vol.5 p.68)

Even though Stemco was a manufacturing oriented company, dependent upon sales for success, Stemco claimed at time of trial that it had decided to eliminate the entire sales force and would resort to sales through its previous unsuccessful system. (vol.4 pp.101 and 104) Stemco claimed that it sought to fill all available positions with the most qualified candidate for each respective position. (vol.4 p.54) Chris Johns, who had been hired from a distributor just two (2) weeks prior to the layoff, was later reinstated post-layoff to fill the position of Distribution Sales Manager. (vol.4 pp.102-04) Despite the claim that Stemco wanted the most qualified person to fill

the position, Paul Norton, President of Stemco, and one of the Stemco officers who made the decision to terminate Atkins, admitted he knew nothing of any of Atkins' qualifications. (vol.4 pp.61-63) In fact, Norton never even spoke with Atkins. (vol.4 p.62) Likewise, Norton did not know Johns before February 14, 1990. (vol.4 pp.105-106) Johns also was of the protected class and was initially laid off. (vol.4 pp.41 and 70) Although laid off, Norton claimed that Johns was immediately reinstated. (vol.4 p.41) In short, Stemco's credibility at trial was on a lengthy sojourn into non-existence.

Prior to trial, Stemco's corporate counsel had answered and sworn to interrogatories which commenced Stemco's sojourn into implausibility. Interrogatory 3 asked Stemco the following question:

> **"State the names of the person or persons who made the decision to discharge the Plaintiff."**

Stemco's corporate attorney had sworn:

> **"John Guffey *and* Paul Norton"**

(emphasis added) (vol.4 p.47). Nevertheless, Norton claimed at trial that Norton and Norton alone was the decision maker and that Guffey was never involved (vol.4 p.47). Norton initially maintained this position in trial, even though Guffey himself terminated Atkins face to face. (vol.4 p.102) Ultimately, Norton conceded that Guffey approved Norton's layoff decision regarding Atkins. (vol.4 p.48) Contrary to its memorandum opinion, the trial court concluded during the trial that both Guffey and Norton were involved in the decision to terminate Atkins. (vol.4 p.65/Line 8) Norton was never able to

explain why the company's in-house attorney and assistant corporate secretary had sworn under oath that Guffey and Norton made the decision together. (vol.4 pp.100-02) Most assuredly Norton's motive was to distance Guffey from the decision process since Guffey was the person that had suggested the very same plan to Atkins, Marksberry and McCombs regarding elimination of older workers. (See, vol. 5, pp.51-53) The same plan apparently implemented just two (2) weeks later, February 14, 1990. (vol. 5, p.53).

Atkins' entire case in chief, consisted of two (2) witnesses. Stemco called no witnesses, not even John Guffey to refute his anecdotal remarks made to Atkins regarding the elimination of older workers.

Stemco claimed in preparation for the layoff it compiled some lists of people who were selected for layoff. (vol.4 p.32/Lines 10-14) Despite the claims of discrimination filed by Atkins with the Equal Employment Opportunity Commission, Stemco nevertheless did not produce or offer the lists originally prepared of people selected for layoff. (vol.4 p.32, vol.4 p.109, vol.5 p.16) Rather, Stemco compiled a different list for trial and repeatedly changed its explanation of how the employees' names were either not included in the list of retained employees or were not included in the list of those laid off. (Defendant's Ex. 17 and vol.4 pp.32, 39, 43, 46, 49, 67-70, 94, 111 and vol.5 p.7, 8, 9, 10, 65, 66) Significantly, some younger workers were not included in the list of those retained and some employees 40 and over were not included in the list of terminated employees. (vol.4 pp.31, 32, 36, 40, and 41) At

one point, Norton claimed the omissions were due to the employee being employed in Longview rather than at the site in Dallas. (vol.5 pp.7-10) These statements by Norton ultimately proved to be a total fabrication by Norton and ultimately Norton admitted that his previous sworn explanation for the omissions in the list was *untrue*. (vol.5 pp.7-10)

Apparently, Norton not believing that he had totally annihilated his own credibility, began to rest his head on the chopping block with totally untenable positions. Norton claimed his decision to lay off the sales force was based on his analysis of some profit and loss statements. (vol.4 pp.78-79) He first claimed the statements which were offered and admitted by the defense into evidence were relied upon by him in his decision to process. (vol.4 p.79; see also, Defendant's Exs. 1 and 2) Despite Norton's stated reliance on the documents in this decision process, and his professed analysis of the statements, Norton was unable to explain a 1.8 million dollar apparent expense which was attributed to the costs of sales. (vol.4 pp.119-20) All Norton could say was that the money was spent. (vol.4 p.120) One of the expense statements which Norton claimed he relied upon had no date, and another one had been apparently "revised" and sported an abundance of "white out." (vol.4 pp.120-121) Norton's journey into the world of total fabrication continued.

By April of 1990, Atkins had filed his charge of discrimination with the Equal Employment Opportunity Commission. With that in the works, Stemco apparently

lost or destroyed documents used to select their respective employees for layoff. (vol.4 p.32, vol.5 p.16) Then as if he had not ventured deeply enough into the depths of total fabrication, Norton volunteered the statement that neither Roger Marksberry, General Manager of Stemco, nor Atkins were employed by Stemco, Inc., but rather were employed by Stemco Instruments. (vol.4 pp.43-44, vol.4 p.28) Ultimately, Norton conceded that all of the Stemco employees are really employees of Coltec and that Marksberry was a Vice President of Stemco Instruments. (vol.4 p.27) The omissions only came after Norton was confronted with Stemco's Answers to Interrogatories, which not surprisingly, again were directly contrary to Norton's statements. (vol.4 p.28)

Guffey's boasting of the elimination of older workers in a similar scenario was never refuted. Guffey never mounted the witness stand to refute, deny or even qualify the remarks Atkins testified he made less than 2 weeks before the reduction in force. (vol.5 p.51)

Atkins rested after the testimony of Norton and Atkins. Stemco then moved for instructed verdict, which was denied. (vol.6 p.89) The trial court noted that there was some evidence upon which reasonable minds could differ when announcing that Stemco's motion for directed verdict was denied. (vol.6 pp.95-96) Stemco rested and closed without calling any witnesses. (vol.6 p.97) The jury deliberated and unanimously agreed that Atkins had been discriminated against due to his age and assessed damages. (R-330) Stemco's motion for judgment as a matter of law was granted by the trial court despite Norton's

severe credibility problems, the significant statistical evidence and the unrefuted anecdotal testimony about eliminating older workers by John Guffey, the man who terminated Atkins face to face. (R-398) The Fifth Circuit affirmed the trial court's decision.

REASONS FOR GRANTING THE WRIT

1. When analyzing Atkins' proof under its "pretext-plus" interpretation of *St. Mary's Honor Center v. Hicks*, the Fifth Circuit's reading of *St. Mary's* ended at 113 S.Ct. 2747.

The Court clearly stated that in a discrimination case, if the defendant meets its burden, the plaintiff must then be given the opportunity to show that the reason asserted is pretextual. *See St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2747-50 (1993). The Court stated in *St. Mary's* that "[t]he factfinder's disbelief of the reasons put forward by the Defendant (particularly if disbelief is accompanied by suspicion of mendacity), together with the elements of the *prima facie* case, *may* suffice to show intentional discrimination." (emphasis added) *Id.* The Court, in *St. Mary's*, further held that "rejection of the Defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . [and] '[n]o additional proof of discrimination is *required*.' " (emphasis in original) *Id.* at 2749.

Nevertheless, in its Memorandum Order, the Fifth Circuit in determining that judgment n.o.v. was proper in this case, applied its interpretation of The Court's *St. Mary's* decision. The Fifth Circuit also relied on its

post-*St. Mary's* decision of *Bodenheimer v. PPG Industries, Inc.*, and specifically noted the following language: "To prevail ultimately, the plaintiff must prove, through a preponderance of the evidence, that the employer's reasons were not the true reason for the employment decision *and* that unlawful discrimination was." (emphasis in original opinion) *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 957 (5th Cir. 1993).

Bodenheimer interprets *St. Mary's* to require a "pretext-plus" type showing;[1] however, this language cannot be reconciled with the holding in *St. Mary's* that a determination by the factfinder that the stated reason for termination is false is sufficient to permit the factfinder to infer intentional discrimination. *See, St. Mary's, supra,* 113 S.Ct. at 2749. The *St. Mary's* decision clearly provides that unlawful discrimination may be inferred by the factfinder in cases where the articulated reason for termination has been disproved or rejected. *St. Mary's, supra,* 113 S.Ct. at

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[1] *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d at 957, 959. The Fifth Circuit has cited *Bodenheimer* as precedent for the "pretext-plus" interpretation of *Hicks* in subsequent decisions such as *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 298 (5th Cir. 1994) ("To show that the defendants proffered reason was a pretext for discrimination, . . . [plaintiff] must offer evidence not only that the defendants' proffered was false, but also that age discrimination was the real reason for the defendant's action.) In the *Bodenheimer* opinion, the Fifth Circuit states: "The Court in *St. Mary's* put the issue to bed. To ultimately prevail, the plaintiff must prove, through a preponderance of the evidence that the employer's reasons were not the true reason for the employment decision and that unlawful discrimination was. *St. Mary's*, ___ U.S. ___, 113 S.Ct. at 2747." *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d at 957. Surprisingly the language attributed to The Court is nowhere to be found at page 2747.

2747-50. The Court in *St. Mary's* specifically rejected the "pretext-plus" approach which is now being implemented by the Fifth Circuit. *Id.* at 2749. *St. Mary's* held that a finding of discrimination is required for a plaintiff to prevail; and thereby, dispelled previous decisions which held that rejection of the employer's stated reason for termination automatically mandated judgment against the employer regardless of whether the factfinder believed the true reason for termination was discriminatory. *Id.* at 2747-50. Contrary to the Fifth Circuit's interpretation; however, under *St. Mary's*, an employee may prevail when a finding of discrimination occurs regardless of whether the finding was based on disbelief of the employer's stated reasons for discharge and/or other independent evidence of discrimination. *Id.* at 2749.

At trial, Stemco's proffered reasons for termination were proven to be false, implausible, non-credible and factually unsupported. For instance, the stated reason for termination which was given to Atkins was that the company was being closed down. In actuality, the company was not closed down, but a force reduction occurred. The day after the reduction in force, other younger less experienced workers were rehired. In addition to establishing Stemco's total lack of credibility regarding the alleged reason Atkins was terminated, Atkins presented evidence of age biased statements which were made just two weeks prior to the termination by John Guffey, the man who terminated Atkins. Guffey had stated that eliminating older workers was a good way to reduce negative cash flows, and that he had found this technique successful in the past. Contrary to the initial position of Stemco at trial, the evidence established that Guffey was

involved in the decision to terminate Atkins. Furthermore, Atkins presented statistical evidence that established that the reduction in force was less favorable to the older workers.

Consequently, the factfinder in this case, upon considering Atkins' *prima facie* case of age discrimination[2] and rejecting the "stated reason" for termination, could infer that Atkins was terminated based on his age. The "pretext-plus" requirement of *Bodenheimer* is directly contrary to the "pretext-only" requirement which is permissible under *St. Mary's*. In light of the defendant's serious credibility problems at trial regarding the stated reason for termination, the Fifth Circuit erred in affirming the district court's judgment n.o.v. In accordance with *St. Mary's*, the factfinder upon finding that Stemco's stated reasons for terminating Atkins were false could have properly inferred that Atkins was discriminated against because of his age, even in the absence of additional proof. *St. Mary's, supra,* 113 S.Ct. at 2749.

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[2] The district court and the circuit both determined that Atkins had established a *prima facie* case of age discrimination.

2. The Fifth Circuit needs to recognize the rest of the *St. Mary's* Opinion, particularly the language found at 113 S.Ct. 2749, which the Second, Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits have apparently read and followed.

Most of the other circuits have rejected the "pretext-plus" interpretation of *St. Mary's*.[3] *See, Gallo v. Prudential Residential Services, Limited Partnership*, 22 F.3d 1219 (2nd Cir. 1994); *McKenna v. Pacific Rail Service*, 32 F.3d 820 (3rd Cir. 1994); *Mitchell v. Data General Corp.*, 12 F.3d 1310 (4th Cir. 1993); *Manzer v. Diamond Shamrock Chemicals Company*, 29 F.3d 1078 (6th Cir. 1994); *Anderson v. Baxter Health Care Corp.*, 13 F.3d 1120 (7th Cir. 1994); *Kobrin v. University of Minnesota*, 34 F.3d 698 (8th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993).

In *Anderson*, the court held the following regarding the *St. Mary's* decision:

> It is clear that The Court rejected the "pretext-only" rule applied by the Eighth Circuit. While less clear, it appears that The Court adopted this circuit's version of the "pretext-only" rule rather than the "pretext-plus" approach of the First Circuit.

Anderson v. Baxter Health Care Corp., 13 F.3d at 1123. In making this determination, the *Anderson* court recognized the language in *St. Mary's* which allows that:

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[3] The First and Tenth Circuits appear to be in agreement with the Fifth Circuit's "pretext-plus" interpretation of *St. Mary's*. *See, Hoeppner v. Crotched Mountain Rehabilitation Center, Inc.*, 31 F.3d 9 (1st Cir. 1994); *Wolenski v. Manville Corporation*, 19 F.3d 34 (10th Cir. 1994).

> "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination and the Court of Appeals was correct when it noted that, upon such rejection, 'no additional proof of discrimination is *required*.' " (footnote omitted) (emphasis in original).

Id., citing, St. Mary's, 113 S.Ct. at 2749. The *Anderson* court further recognized that:

> If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age, may rationally be drawn. This is the common sense behind *McDonnell Douglas* . . .

Id.

In another post-*St. Mary's* decision, the Ninth Circuit reversed a summary judgment granted in favor of an employer in a race discrimination case, and stated:

> [I]f a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed.

Washington v. Garrett, 10 F.3d 1431, 1433 (9th Cir. 1993). The *Washington* court further held that:

> Because, as *St. Mary's* recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a *prima facie* case

> and showing of pretext, without anything more, there will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true.

Id. Clearly "pretext-plus" is a stranger to The Court's *St. Mary's* opinion. A phantom which is peculiar to the Fifth, First and Tenth Circuits.

3. In almost any other circuit, Atkins' proof and the favorable jury verdict would have resulted in a judgment for the Plaintiff in accordance with *St. Mary's*.

St. Mary's allows for a factfinder to determine that discrimination exists in cases such as the present case wherein the defendant's proffered reason for termination is shown not to be true. *Id.* at 2749.[4]

Contrary to its current position, the Fifth Circuit has previously recognized that:

> In most employment discrimination cases, unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree . . . Employers are rarely so cooperative as to include a notation in the personnel

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[4] *See, Gallo v. Prudential Residential Services, Limited Partnership*, 22 F.3d 1219 (2nd Cir. 1994); *McKenna v. Pacific Rail Service*, 32 F.3d 820 (3rd Cir. 1994); *Mitchell v. Data General Corp.*, 12 F.3d 1310 (4th Cir. 1993); *Manzer v. Diamond Shamrock Chemicals Company*, 29 F.3d 1078 (6th Cir. 1994); *Anderson v. Baxter Health Care Corp.*, 13 F.3d 1120 (7th Cir. 1994); *Kobrin v. University of Minnesota*, 34 F.3d 698 (8th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1993).

> file, "fired due to age," or to inform a dismissed employee candidly that he is too old for the job . . .

Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 638 (5th Cir. 1985).

In most cases, the absence of direct evidence of age discrimination is almost inevitable, thus circumstantial evidence may suffice to establish liability for discrimination. The method of proof utilized in *St. Mary's, McDonnell Douglas,*[5] and *Aikens,*[6] suffices to establish circumstantially that the employer's actions were motivated by *intentional* discrimination. This is so because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *United States Postal Serv. v. Aikens, supra,* 460 U.S. at 716; *accord, Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633 (5th Cir. 1985). There is not now, nor has there ever been, any requirement that discriminatory animus be established by direct evidence, and it is reversible error to so require. *United States Postal Serv. v. Aikens, supra.*

A recognized manner of showing that the employer's stated reason for its action is a pretext is through the use of direct evidence of discriminatory animus, such as age-related remarks by the employer or the employer's representatives. *See, Normand v. Research Institute of America, Inc.*, 927 F.2d 857 (5th Cir. 1991); *Fowler v. Carrollton Public Library*, 799 F.2d 976, 984 (5th Cir. 1986). In this case, just two weeks before Atkins was terminated, Atkins was told

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[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[6] *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

by John Guffey that it was an advantageous business practice to lay off workers who were over 40 years of age because they were expensive. Guffey advised Atkins to lay off older workers, and even bragged about having successfully done this himself in situations in the past. The anecdotal statements regarding the desire to eliminate older employees from the workplace were uncontroverted at trial. Two weeks after making these age-based work force reduction statements to Atkins, Guffey informed Atkins that he was being terminated because the company was closing down. That "stated reason" for termination was not true, and proven to be false at trial. The age-related comments by Guffey were a prophecy of the foreboding layoff of February 14, 1990. In its memorandum order, the district court found that Guffey's statements were not probative because it was Paul Norton who made the decision to terminate Atkins. This was contrary to the testimony at trial, as well as the district court's own observation at trial, that both Paul Norton and John Guffey were the decision makers. The circuit court was also of the opinion that Guffey's age-based comments somehow were not probative of discriminatory animus in Atkins' case. The Fifth Circuit determined that Guffey's statements were not discriminatory because they were not directed at older workers, but rather were only directed at *costly* older workers, i.e., senior workers with high salaries and costly benefits. The Fifth Circuit's interpretation of Guffey's age-related statements improperly twists the evidence which was uncontroverted at trial, to-wit:

> "And he [Guffey] said – he told me [Atkins] that the most effective method in [reducing negative

> cash flow] – was to reduce head count, because that's your most expensive thing, and the best way to that, get rid of your older workers because they cost the most because they had the highest benefits, most wages."

Contrary to the circuit court's twisted interpretation, Guffey's age-based method of reducing the head count did not involve an analysis of the cost effectiveness of each individual worker regardless of age, but rather involved the simple elimination of older workers.

The circuit court also fallaciously reasoned that Guffey's remarks were not applicable to Atkins because: he was not a senior employee; there were "undeniable" economic justifications for the layoff; Atkins was not better qualified than Chris Johns (who was rehired the day after the company allegedly closed down); Johns was only a few years younger than Atkins and Atkins had been hired 6 months earlier at the same age. This reasoning of the circuit court wholly disregards the evidence at trial upon which the jury could have reasonably determined that Atkins was discriminated against based on his age, specifically: that Stemco's credibility was nonexistent; that Atkins was a highly paid older worker; that Atkins was clearly more qualified than Chris Johns; that Paul Norton, the president of Stemco, had virtually no understanding of the alleged economic justifications for the layoff; that Guffey's unrefuted statements about eliminating older workers from the workplace were made just a few weeks prior to Atkins' termination; and that the statistical evidence presented at trial overwhelmingly demonstrated that older workers fared less favorably than younger workers after the layoff was effectuated.

CONCLUSION

The Fifth Circuit erred in affirming the district court's judgment n.o.v. The evidence at trial was more than sufficient to allow a reasonable factfinder to determine that Atkins was terminated because of his age. In accordance with The Court's analysis in *St. Mary's*, in almost any other circuit, the evidence of Atkins' *prima facie* case, together with the disbelief of the employer's stated reason for termination would permit the factfinder to infer discrimination. Furthermore, Atkins presented evidence of age-related anecdotal remarks by the employer as well as statistical evidence that the reduction in force was age biased. When all the evidence is viewed in the light most favorable to Atkins, there is sufficient evidentiary basis for a jury verdict in Atkins' favor. The granting of a judgment n.o.v. in this case was error.

WHEREFORE, PETITIONER, George David Atkins, respectfully prays that The Court grant Petitioner's Writ of Certiorari, reverse the judgments of the Court of Appeals for the Fifth Circuit and the district court with instructions to enter judgment in accordance with the jury verdict.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1641
Summary Calendar

GEORGE DAVID ATKINS,

Plaintiff-Appellant,

versus

COLTEC INDUSTREIS, INC., further known as Colt Industries, Inc. and STEMCO, INC.

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-443-G)

(Filed Aug. 18, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis or well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

George David Atkins sued Coltec Industries, Inc. and Stemco, Inc. arguing that he was discharged from his employment on account of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1985 & Supp. 1994). Following a jury verdict in Atkins's favor, the district court granted a judgment as a matter of law in favor of the defendants. Atkins appeals this judgment. Because the evidence presented at trial overwhelmingly demonstrates that the defendants did not discriminate against Atkins on the basis of age, we affirm.

I

In July 1989, Stemco Instruments hired Atkins as their Director of Marketing and Sales. Stemco Instruments produced and sold the "AutoCoach," an on-board computer for commercial trucks that records activities while driving to help decrease costs associated with operations. Stemco marketed the AutoCoach through two separate avenues: it was sold directly to end users, and it was supplied to distributors who, through their own direct sales staff, sold the product to end users. Atkins, who had experience with computers and computer sales, was hired to generate an overall marketing strategy and to strengthen and improve the existing sales force. According to Atkins, he spent the majority of his time – eighty-five to ninety percent – working with Stemco's direct sales staff, providing, for example, instruction on selling techniques, and teaching time management skills.

Although the AutoCoach line had good potential, at the time Atkins was hired Stemco was experiencing severe financial troubles. In 1988, the company sustained a net

loss of over $1.8 million, and in 1989 it lost almost $3.1 million. In early 1990, Paul Norton, formerly the president of Stemco Truck Products Division, assumed control of Stemco Instruments. The problems faced by Stemco Instruments were two-fold. First, the product contained some serious defects that would take time to cure. Because of the defects, customers were making a large number of warranty claims, and these claims contributed to Stemco's second major problem – $5 million in losses over two years. After consulting with his superiors, Norton determined that Stemco, first and foremost, needed to remedy the product defects. While Stemco's engineering department worked to cure the defects, Norton concluded that it would be unwise to continue selling a defective product to new customers. However, existing customers – many of whom were experiencing difficulties with the AutoCoach – would continue to require some servicing in order to protect Stemco's reputation. Once the defects in the AutoCoach had been corrected, Stemco would then focus its efforts on sales and marketing to new customers.

To effect his strategy, Norton, with the approval of his supervisor John Guffey, terminated approximately twenty-seven of Stemco's forty employees on February 14, 1990. First, Norton terminated Stemco's Vice President and General Manager, whom Norton considered to be largely responsible for Stemco's troubles. He then dismissed the entire sales force, including Atkins, because direct sales of the AutoCoach had been indefinitely suspended; Norton, however, would continue to maintain an open line of communications to existing distributors. He discharged the financial department, concluding that it

would be more economical to have the financial reporting completed by Stemco's parent company's financial department. Norton also released the manufacturing department's support staff, keeping only those assemblers who were responsible for assembling the Auto-Coach. Norton also moved the manufacturing operations from its own building across town to share an affiliated company's facilities. Norton made further staff reductions in the engineering department, keeping only those engineers who Norton thought were most qualified to correct the existing problems, and who could help existing customers with their problems.

Almost immediately after Norton terminated the entire sales staff, the new Vice President and General Manager suggested that Norton rehire one member of the sales staff, Chris Johns. Johns, who previously had worked at one of Stemco's distributors selling the Auto-Coach line and other similar products, had been hired by Atkins to communicate between Stemco and its network of distributors. According to the new vice president, Johns should be retained because Stemco needed at least one person to continue servicing the distributors. Norton agreed, and rehired and reinstated Johns in his former position.

II

Atkins later sued Stemco and Coltec, claiming that Stemco violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1985 & Supp. 1994) (referred to

hereafter as the "ADEA"), when it discharged him.[1] The case was tried to a jury, during which Atkins presented only two witnesses – himself and Paul Norton. After deliberations, the jury concluded that Stemco had discriminated against Atkins on the basis of age in violation of the ADEA, and awarded $91,000 in damages. The district court, however, entered a judgment as a matter of law in favor of the defendants, stating that the evidence so strongly and overwhelmingly favored the defendants that a reasonable fact-finder could not find for Atkins. Atkins appeals this judgment.

III

Atkins contends that the district court erroneously disregarded a valid jury verdict in his favor when it entered judgment as a matter of law in favor of the defendants pursuant to Federal Rule of Civil Procedure 50(a). As we have noted many times before, when reviewing the entry of a judgment as a matter of law,

> the Court should consider all of the evidence – not just that evidence which supports the non-mover's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court

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[1] The questions presented to the jury in the charge clearly indicate that Atkins tried the case as an improper discharge – not a failure to rehire. To support his contention, however, he argued at trial and on appeal that because of age discrimination the younger Chris Johns was rehired for the job he, Atkins, claims should have been his.

> believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper.

Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969)(en banc).

In an age discrimination case, the plaintiff ultimately bears the burden of persuading the trier of fact that the defendant intentionally discriminated on the basis of age. *St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407(1993); *Molnar v. Ebasco Constructors, Inc.*, 986 F.2d 115, 118 (5th Cir. 1993). In the absence of direct evidence of discrimination, the plaintiff must produce sufficient evidence to make out a *prima facie* case. *Id.* Once the plaintiff establishes a *prima facie* case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment decision that adversely affected the plaintiff. *See, e.g., Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 811 (5th Cir. 1991). After an employer provides nondiscriminatory reasons for the employment decision, the burden of production shifts back to the plaintiff to prove that the reasons articulated by the employer are not the true reasons for the employment decision, but instead are pretexts to disguise unlawful discrimination. *Id.* A plaintiff may demonstrate pretext directly by showing that a discriminatory motive likely motivated the employer, or indirectly by showing that the employer's explanation is not credible. *Id.* at 813. Merely demonstrating that the employer's proffered reasons were pretextual, however, will not alone establish age discrimination; "[t]he ultimate burden of persuading the trier of fact that the

defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *St. Mary's Honor Ctr. v. Hicks*, 113 S.Ct. at 2747; *see also Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 957 (5th Cir. 1993) ("To prevail ultimately, the plaintiff must prove, through a preponderance of the evidence, that the employer's reasons were not the true reason for the employment decision *and* that unlawful discrimination was.").

When a case has been fully tried on the merits, the adequacy of a party's showing at any particular stage of the case is unimportant. *Molnar v. Ebasco Constructors, Inc.*, 986 F.2d at 118. We focus our inquiry on whether the record contains evidence upon which a reasonable trier of fact could have concluded as the jury did. *Id.; Walther v. Lone Star Gas Co.*, 952 F.2d 119, 122-23 (5th Cir. 1992). Thus, like the district court, we assume that Atkins established a *prima facie* case. Likewise, Stemco rebutted that inference by providing a legitimate nondiscriminatory reason for Atkins's discharge – that is, restructuring because of the company's poor performance reflected by its increasing financial losses over a two-year period. The burden of production then shifted back to Atkins to demonstrate pretext. In this fully tried case, however, we are not now concerned with burden shifting. Our job is to determine whether the record before us contains evidence upon which a reasonable fact-finder could have concluded that Atkins proved by a preponderance of the evidence that Stemco intentionally discriminated against him on the basis of his age when it discharged him.

IV

Atkins argued that Stemco discharged him because of his age, based on the following evidence: first, Atkins was better qualified than Johns, the younger employee who was rehired as the manager of Stemco's sales to distributor; second, statistical evidence demonstrated that younger employees fared better in Stemco's reduction-in-force than older employees; and finally, John Guffey, a Vice President of Colt Industries, Stemco's parent company, told Atkins that getting rid of older workers was a good way to reduce costs. When all the evidence presented at trial is considered, however, we hold that a reasonable fact finder could not find that Stemco discharged Atkins on account of his age.

A

First, Atkins argues that a reasonable jury could conclude that age was a determining factor in Stemco's decision to terminate him because Chris Johns, a younger employee, was rehired to continue working as the manager of sales to distributors. The determinative issue in this case is *not* who was better qualified to perform Johns's [sic] duties; those basic determinations are left to the sound business discretion of the company involved, and we should not and will not second guess those decisions. *See Walther v. Lone Star Gas Co.*, 952 F.2d at 123 ("The ADEA was not intended to be a vehicle for judicial second guessing of business decisions, nor was it intended to transform the courts into personnel managers."). If, however, the evidence shows that the plaintiff is *clearly better qualified* than the retained employee, the

fact-finder may use this fact in concluding that the employer's articulated reason for termination of the older and better qualified employee is only a pretextual reason for age discrimination. *Id.*

In this case, however, Atkins never argued that he was "clearly better qualified" than Johns – he argued only that Johns was younger and less experienced. The undisputed evidence revealed that prior to joining Stemco, Atkins knew nothing about Stemco or the Auto-Coach product line, and that he had never worked for a distributor in the trucking industry. Atkins's expertise rested in the area of managing direct sales forces and generating marketing strategies. Johns, by contrast, had five years of experience working for a major distributor, selling the AutoCoach product line and other similar Products. As a result of this work, Johns had a detailed knowledge of the product line and a thorough understanding of the needs of distributors. Moreover, Johns, who at age forty-one was only six years younger than Atkins, was a member of the same protected class of which Atkins was a member; clearly, this age difference is less probative of a discriminatory motive than a wide disparity in age. Thus, Stemco's decision to rehire Johns does not support Atkins's age discrimination claim.

B

Next, Atkins presented statistical evidence to demonstrate that Stemco's reduction-in-forces was biased against older workers. Specifically, he produced evidence that prior to the layoff, forty percent of the forty Stemco employees were over age forty. After the layoff, only

thirteen percent of the remaining employees were over forty. Additionally, Atkins's [sic] statistics stated that the average age of the employees who were released was forty-one, while the average age of the group retained was thirty-three.

As the United States Supreme Court has warned, statistics "come in infinite variety" and that "their usefulness depends on all of the surrounding facts and circumstances." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977). We have previously noted that statistics may be deceptive, "[p]articularly in age discrimination cases where innumerable groupings of employees are possible according to ages and divisions within the corporate structure." *Walther v. Lone Star Gas Co.*, 952 F.2d at 124.

In this case, the district court correctly noted that Atkins's [sic] statistical evidence was inconclusive where entire divisions of workers were terminated. Where entire divisions are terminated, the fact that statistics reveal that those terminated tended to be employees in the protected class does not lead to the conclusion that the company selectively weeded out older employees while retaining younger employees. Moreover, the fact that Atkins was hired at virtually the same age at which he was fired indicates that Stemco did not have a general aversion to workers who were over forty. We agree with the district courts holding that "[o]n the basis of the statistical comparisons presented here, it was not possible for a reasonable jury to conclude that age was a factor in Stemco's decision to eliminate its sales force."

C

Finally, Atkins argues that a statement allegedly made by John Guffey, a Vice President of Stemco's parent company, is evidence of Stemco's discriminatory intent. Sometime before the mass layoff, Atkins and two other Stemco employees were considering an employee buy out of Stemco. In pursuit of that goal, Atkins and two other individuals, met with Guffey two or three weeks before the layoff to discuss the proposed buy out. At trial, Atkins testified that Guffey told them that one of the best ways to reduce a negative cash flow "was to reduce head count, because that's your most expensive thing, and the best way to do that, get rid of your older workers because they cost the most because they had the highest benefits, most wages." Atkins also testified that Guffey boasted of effectively employing such methods in the past.

An examination of Guffey's statement leads to the conclusion that it is not necessarily probative of an intent to discriminate on the basis of an employee's age. Guffey stated in essence that a company can reduce a negative cash flow by eliminating *costly* older workers. It does not follow, however, that if an employee is simply older he is more expensive to retain than a younger employee; instead, the cost determinative issue is whether the employee has acquired seniority, and the increased salary and benefits that accompany seniority. Senior workers – who admittedly are also typically older – usually have acquired higher salaries and fringe benefits simply because they have worked for the company for an extended period of time. Thus, terminating senior workers who have acquired the high salaries and expensive benefits, while retaining non-senior workers, would

improve a company's negative cash flow. We have held, however, that in the final analysis seniority and age discrimination are wholly unrelated. *Williams v. General Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. Unit B 1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982); *see also Hamilton v. Grocers Supply Co.*, 986 F.2d 97, 99 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2929, 124 L.Ed.2d 679 (1993) and ___ U.S. ___, 114 S.Ct. 77, 126 L.Ed.2d 45 (1993); *Amburgey v. Corhart Refractories Corp.*, 936 F.2d at 813 n.38. Furthermore, Guffey's statement is not probative of age discrimination in this case because Atkins was not a senior employee. Instead, Atkins had been hired only six months prior to the layoff. Finally, any generally incriminating statement loses much of its weight when we have determined that there were objective and undeniable economic justifications for the layoff, that Atkins was not clearly better qualified than the rehired employee, that Atkins was hired only six months earlier at approximately the same age, and that the rehired employee was himself only a few years younger and also within the protected class.

V

After considering all of the evidence presented at trial, we agree with the district court and conclude that the facts and inferences point so strongly and overwhelmingly in favor of Stemco that reasonable jurors could not arrive at a contrary verdict. Consequently, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE DAVID ATKINS, Plaintiff, VS. COLTEC INDUSTRIES, INC. f/k/a COLT INDUSTRIES, INC., and STEMCO, INC., Defendants.	)	CIVIL ACTION NO. 3:92-CV-0443-G

MEMORANDUM ORDER

(Filed June 18, 1993)

Before the court is the motion of defendants, Coltec Industries, Inc. ("Coltec") and Stemco, Inc. ("Stemco") for judgment as a matter of law under Fed. R. Civ. P. 50(b). For the reasons stated below, the motion is granted.

I. NATURE OF THE CASE

George David Atkins ("Atkins") brought this suit against defendants alleging he was discharged from his employment on account of his age, in violation of the Age Discrimination in Employment Act ("the ADEA"), 29 U.S.C. § 621 *et seq.*

In July of 1989, Atkins began his employment as National Sales Manager for Stemco Instruments. Stemco produces and sells "AutoCoach," an on-board computer

for commercial trucks which records activities while driving. Analysis of the recorded data allows for improved productivity of the driver and vehicle. Stemco sold the AutoCoach products directly to truck fleet groups, as well as to various dealers or distributors around the country who maintained their own sales forces.

At trial, Atkins' testified that his responsibilities included the supervision of all Stemco's salespeople and sales support personnel, and the development and implementation of the company's marketing plan. Atkins also stated that between 85% and 90% of his time was spent supervising salespeople. Atkins had no experience with the AutoCoach product line prior to his employment with Stemco.

The evidence was undisputed at trial that Stemco had a troubled financial history. In 1988, the company sustained a net loss of over $1.8 million, and in 1989, the company lost almost $3.1 million. Paul Norton ("Norton"), President of the Stemco Truck Products Division, testified that in early 1990, he assumed control of the Stemco Instruments operation in an attempt to reduce financial losses. Norton determined that it was necessary to reorganize the company and reduce the company's work force. Accordingly, all sales prospecting activities and all sales to new national accounts would be discontinued for an indefinite period while the company reorganized. However, the company would still provide technical assistance to existing customers and supply distributors with products.

On February 14, 1990, Stemco notified all its sales representatives and sales support staff, including Atkins,

of their termination. A total of twenty-three Stemco Instruments employees were laid off as a result of this reduction in force. Since February 14, 1990, Stemco Instruments has not hired any new salespersons.

Shortly after the termination of the sales staff, Stemco decided to retain, rather than discharge, Chris Johns ("Johns"), age 40, whose job was managing the supply of the AutoCoach product line to the company's distributors. Since the distributors maintained their own sales force to market the AutoCoach product, Johns' responsibility would be providing necessary customer service support to the distributors. At trial, Atkins claimed he was qualified for the job Johns was retained to perform and that many of his previous job duties were included in Johns' present position.

In February, 1993, this case was tried before a jury. On February 12, the jury returned its verdict finding (1) age was a determining factor in Stemco's decision to discharge Atkins; (2) $91,000, if paid now in cash, would fully compensate Atkins for back pay lost as a result of his discharge, and (3) Stemco did not willfully violate the ADEA in discharging Atkins.

At the conclusion of the plaintiff's case and again at the conclusion of the entire case, before submission to the jury, defendants moved for judgment as a matter of law under Fed. R. Civ. P. 50(a). Defendants now renew their motions for judgment as a matter of law after trial and return of the jury verdict.

II. APPLICABLE STANDARD

Fed. R. Civ. P. 50(a) provides:

> If during a trial by jury a party has been fully head with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

The Fifth Circuit has described the standard this court must apply stating:

> [T]he Court should consider all of the evidence – not just that evidence which supports the non-mover's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper.

Boeing Company v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (*en banc*). *See also Turner v. North American Rubber, Inc.*, 979 F.2d 55, 58 (5th Cir. 1992).

III. Evidentiary Burdens in an Employment Discrimination Case

In an age discrimination case, the plaintiff bears the burden of persuading the trier of fact that the defendant

intentionally discriminated. In the absence of direct evidence of discrimination, the plaintiff must make out a prima facie case in order to establish a rebuttable presumption of discrimination. *See United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 714-16 (1983); *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-58 (1981); *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 800-05 (1973). In a reduction-in-force context, an employee must show (1) that he is within the group of persons protected under the ADEA and that he was adversely affected by the employer's decision; (2) that he was qualified to assume another position at the time of the discharge; and (3) produce "evidence, circumstantial or direct, from which a fact-finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Williams v. General Motors Corporation,* 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied,* 455 U.S. 943 (1982); *Thornbrough v. Columbus and Greenville Railroad Company,* 760 F.2d 633, 642 (5th Cir. 1985).

The burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment decision. *Burdine,* 450 U.S. at 253-54. If the employer satisfies the burden of articulating a legitimate, nondiscriminatory reason for its action, the presumption of discrimination is negated, and the burden of production shifts back to the employee to prove, by a preponderance of the evidence, that a discriminatory motive more likely motivated the employer or indirectly by showing that the employer's explanation is unworthy of credence. *Molnar v. Ebasco Constructors, Inc.,* 986 F.2d

115, 118 (5th Cir. 1993) (citing *Amburgey v. Corhart Refractories Corporation, Inc.*, 936 F.2d 805, 813 (5th Cir. 1991)). *See also Aikens*, 460 U.S. at 715; *McDonnell Douglas*, 411 U.S. at 802-05.

"When a case has been fully tried on the merits, the adequacy of a party's showing at any particular state of the *McDonnell Douglas* ritual is unimportant." *Molnar*, 986 F.2d at 118 (citing *Walther v. Lone Star Gas Company*, 952 F.2d 119, 122-23 (5th Cir. 1992)). Accordingly, the court will assume, for the [sic] of this motion, that Atkins made out a proper *prima facie* case.[1] The court must then decide whether the record contains evidence upon which a reasonable trier of fact could have concluded, as the jury did, that Stemco's articulated reason for Atkins' termination was a mere pretext for intentional age discrimination. *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 564 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

Atkins maintains that a reasonable jury could have found pretext for three reasons: (1) Atkins was better qualified than Johns to fill the allegedly available position after Stemco's reduction-in-force; (2) statistical evidence

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[1] It is uncontroverted that Atkins was terminated and that, at age 47, he was within the class of persons protected by the ADEA. However, the parties are in disagreement as to whether there was a position with Stemco that Atkins was qualified to assume at the time of his discharge.

Atkins claims that he was qualified for the position for which Johns was retained. Stemco, however, maintains that Johns was better qualified for the position because it was the same position he held prior to the reduction-in-force. On this motion, the court assumed that Atkins was qualified for Johns' position, and that Atkins thus established a *prima facie* case.

shows that younger employees fared better in the reduction-in-force than older employees; and (3) John Guffey ("Guffey"), a Vice-President of Colt Industries, told Atkins that getting rid of older workers was a good way to save costs. Stemco contends, however, that Atkins' evidence is legally insufficient to show that his discharge was due to age. The court agrees.

A. Johns' Position

At trial, Atkins contended that he had the minimum qualifications to fill the position that Chris Johns now holds. Further, Atkins alleged that Stemco's selection of Johns, a younger employee, to fill the position was circumstantial evidence that Stemco discriminated in terminating Atkins. Of course, the issue in this case is not whether Atkins or Johns was better qualified, because Stemco is entitled to make that decision itself. *Thornbrough*, 760 F.2d at 647. However, where the fact finder determines that Atkins was clearly better qualified than a retained employee, it is entitled to conclude that the employer's articulated reason for termination is pretextual. *Id. See also Walther, above*, 952 F.2d at 123 (5th Cir. 1992); *Amburgey, above*, 936 F.2d at 814.

Although evidence that Atkins was "clearly better qualified"for Johns' job is one way of showing that Stemco's reason for discharging Atkins was pretextual, *Amburgey*, 936 F.2d at 814, Atkins maintained at trial only that Johns was a younger and less experienced employee. Even this narrower claim, however, is (except for the difference in age between Atkins and Johns) unsupported

by any objective evidence. The evidence was uncontradicted that prior to joining Stemco, Atkins knew nothing about the company or the Autocoach line of products and that he had never worked for a distributor in this industry. Johns, by contrast, had experience working for a major distributor of the Autocoach product line for five years prior to joining Stemco. As a result, he not only had a detailed knowledge of the product line but also a thorough understanding of the distribution sales network.

In fact, neither Atkins nor any other witness testified that Atkins was better qualified for Johns position. Even if Atkins had so testified, that evidence would not have been legally sufficient to prove that he was clearly better qualified. "[M]erely because a plaintiff testifies he was capable of handling one or two or many salaried jobs other than his own, yet was not relocated to such a job during the reduction, is not enough to show violation of the ADEA." *Williams, above,* 656 F.2d at 129; *see also Amburgey,* 936 F.2d at 814 (affirming summary judgment for employer where plaintiff produced only conclusory allegations that he was well qualified).[2]

"The ADEA was not intended to be a vehicle for judicial second guessing of business decisions, nor was it intended to transform the courts into personnel managers." *Thornbrough, above,* 760 F.2d at 647. There is no evidence to support Atkins' present contention that he was clearly better qualified than Johns for the position

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[2] *Cf. Walther,* 952 F.2d at 123 (holding evidence supported a finding of discrimination where the plaintiff's immediate supervisor conceded that he was more qualified).

occupied by Johns.[3] In the absence of such evidence, it is not the court's role to question Stemco's business decision to retain Johns for the position.

B. Statistical Evidence

Atkins presented statistical evidence at trial to show that Stemco's reduction-in-force favored younger employees. Specifically, Atkins displayed charts indicating that before the reduction-in-force, 40 percent of the employees were over 40 years old and after the reduction-in-force, only 13 percent of the employees were over 40 years old. Another chart showed that 58 percent of the employees in the group fired were over 40 compared to the 13 percent in the group retained. Yet another chart told the jury that the average age of the group fired was 41 years old whereas the average age of the group retained was 33 years old.

Atkins' statistical evidence compared the ages of the group laid off with the ages of the employees left at the company. However, such a comparison is inconclusive where, as here, the *entire* sales force was discharged. These statistics to not permit the inference that Stemco selectively weeded out older workers where the company made a business decision to conclude all of its new sales activities.

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[3] The Fifth Circuit has held that even if employees are performing adequately, an employer is not prohibited "from replacing [them] with [those] whom [it] subjectively believes will do a better job." *Elliott*, 714 F.2d at 567.

In fact, another look at the statistics creates quite a different picture than that Atkins seeks to paint. Stemco discharged its entire sales force of twenty-three people. Twelve of those employees were 40 years of age or older; eleven were under age 40. Thus, the decision to eliminate the company's sales force affected an almost equal number of older and younger employees. *See Hanchey v. Energas Company*, 925 F.2d 96, 98-99 (5th Cir. 1990) (summary judgment for employer proper where seven of the eleven positions eliminated in central Louisiana were held by persons under 40). The fact that the average age of the employees remained at Stemco was younger after the reduction-in-force is legally insufficient to establish that Stemco's reason for eliminating its sales force is a mere pretext for age discrimination.[4]

The evidence was undisputed that Stemco was in serious financial trouble. It was not the jury's role to evaluate whether the company's decision on how to reduce costs was the best way of dealing with its financial problems, as long as that decision was not a pretext for prohibited discrimination. *See Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1508 (5th Cir. 1988) ("[t]he ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions

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[4] The Supreme Court has warned that statistics "come in infinite variety" and that "their usefulness depends on all the surrounding facts and circumstances." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 (1977). Statistics are easily manipulated and may be deceptive, "[p]articularly in age discrimination cases where innumerable groupings of employees are possible according to ages and divisions within the corporate structure." *Walther*, 952 F.2d at 124.

which are unlawfully motivated"). On the basis of the statistical comparisons presented here, it was not possible for a reasonable jury to conclude that age was a factor in Stemco's decision to eliminate its sales force. *See Hill v. K-Mart Corporation*, 699 F.2d 776, 780 n. 7 (5th Cir. 1983) (care with which statistics are reviewed must be especially marked in a disparate treatment case," since if the required showing of motive is to be inferred, we must be certain that the inference rests on firmer ground than uninterpreted numbers"); *Pouncy v. Prudential Insurance Company of America*, 668 F.2d 795, 804-05 (5th Cir. 1982) (cautioning "those who would enter the courthouse armed with statistics that prove little more than a litigant's resourcefulness at manipulating numbers").

C. Statement by John Guffey

Atkins also maintains that a statement attributed to John Guffey ("Guffey") is evidence of intentional age discrimination. Atkins testified that in evaluating Atkins' business plans to run Stemco, if Atkins were successful in purchasing the company,[5] Guffey stated that Atkins would need to lower his negative cash flow, and that the best way to accomplish this task was "to get rid of older workers."

Such a statement by Guffey is not direct evidence of discrimination. Direct evidence "prove[s] the particular fact in question without reliance upon inference or presumption." *Randle v. LaSalle Telecommunications, Inc.*, 876

[5] Atkins, along with some other employees, was attempting to buy the Stemco business.

F.2d 563, 569 (7th Cir. 1989). Further, the direct evidence must not only speak directly to the issue of discriminatory intent, but must also relate to the specific employment decision in question. *Id.; Furr v. AT & T Technologies, Inc.*, 824 F.2d 1537, 1549 (10th Cir. 1987). Guffey's statement is not probative of age discrimination because it was not directly related to the reduction-in-force at issue in this case.

Under the ADEA, the only determinative factor is the motivation of the person who made the employment termination decision. *See Guthrie v. Tifco Industries*, 941 F.2d 374, 379 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1267 (1992); *Normand v. Research Institute of America, Inc.*, 927 F.2d 857, 864 n.3 (5th Cir. 1991). Norton testified that it was he, not Guffey, who decided that the entire sales function would have to be eliminated. Although Atkins testified that Guffey told him that he was the one who made the decision regarding what to do with the company, there was no evidence that Guffey had any input into Norton's decision as to which functions of the Stemco operation to eliminate, or who specifically to discharge. Thus, the only relevant inquiry is the motivation of Norton, and there is no evidence that Norton made the decision to eliminate the sales force for other than purely financial reasons.

However, even if Guffey did make the alleged statement and did have input into Stemco's decision to reduce its force, these facts alone do not support a verdict for the plaintiff. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient;

there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).[6]

IV. CONCLUSION

In sum, the evidence shows that Stemco had to reduce its work force. Atkins was just one of twenty-three people released. Although Atkins believed that he was terminated because of age, and believed that he was better qualified for an allegedly available job than an employee retained, self-serving and speculative testimony is subject to intense scrutiny. *Elliott*, 714 F.2d at 564. Specifically, testimony by an employee regarding his subjective belief that his termination resulted from age discrimination is insufficient to make an issue for the jury in the fact of proof showing an adequate, non-discriminatory reason for his release. *Houser v. Sears, Roebuck & Co.*, 627 F.2d 756, 759 (5thCir. 1980). Even though Atkins was not required to produce direct proof of age discrimination, his indirect proof is barely enough to establish a *prima facie* case, and certainly not enough to rebut Stemco's legitimate reasons for the reduction-in-force. *See Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312, 1315-16 (5th Cir. 1986); *Neely v. Delta Brick and Tile Company*, 817 F.2d 1224, 1226 (5th Cir. 1987).

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[6] *See also Neely v. Delta Brick and Tile Company*, 817 F.2d 1224, 1226 (5th Cir. 1987) ("*Boeing* assumed that some evidence may exist to support a position which is yet so overwhelmed by contrary proof as to yield to a directed verdict; it is not necessary that the evidence be no more than a scintilla or amount to a claim that frogs fly or stones levitate").

Accordingly, the defendants' motion for judgment as a matter of law is granted.

SO ORDERED.

June 18, 1993.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE DAVID ATKINS	X	NO.
Plaintiff	X	3:92-CV-0443-G
	X	
VS.	X	Dallas, Texas
	X	February 8, 1993
COLTEC INDUSTRIES, INC. f/k/a COLT INDUSTRIES, INC. and STEMCO, INC.	X	1:30 O'Clock P. M.
	X	
	X	(Filed Jun. 22,
Defendants	X	1993)

TRANSCRIPT OF PROCEEDINGS
TRIAL ON ITS MERITS
BEFORE THE HONORABLE A. JOE FISH
UNITED STATES DISTRICT JUDGE
AND A JURY
VOLUME II

APPEARANCFS:

For the Plaintiff:	JOHN W. WALL, JR. LAURA CALHOUN Suite 103 3109 Carlisle Dallas, Texas 75202
For the Defendants:	Andrews & Kurth BY: MARK SCHWARTZ JIM HART 4200 Texas Commerce Tower Houston, Texas 77002
Court Reporter:	Carl T. Black P. O. Box 501032 Dallas, Texas 75250

ORIGINAL

[p. 15] courtroom even if he is to be a witness and also Mr. Norton if he is to be the designative representative of the Defendants.

Is that right, Mr. Schwartz?

MR. SCHWARTZ: That is right, Your Honor.

THE COURT: Mr. Norton, would you please raise your right hand.

(The witness Paul Holmes Norton was sworn.)

THE COURT: Please speak directly into the microphone while you are testifying so that all of us can hear you, please.

All right, Mr. Wall.

MR. WALL: Thank you, Your Honor.

PAUL HOLMES NORTON, PLAINTIFF'S WITNESS SWORN

DIRECT EXAMINATION

BY MR. WALL:

Q Mr. Norton, could you please state your full name for the Court and the jury, please?

A I am Paul Holmes Norton.

Q And you are employed by Stemco Instruments?

A No, I am employed by Stemco.

Q Stemco. Is that a subsidiary of Coltec Industries?

A Yes, it is.

Q And in your – what is your job title or position with them?

[p. 16] A I am President of Stemco.

Q And were you President of Stemco in February of 1990?

A Yes, I was.

Q And were you in January of 1990 as well?

A Yes.

Q Okay. When did you make the decision to make this reduction in force?

A In late January, 1990.

Q Late January?

A Yes.

Q How late in January of 1990?

A It was in the latter half. I don't know the exact date.

Q Some time after the 15th but before the 31st?

A Correct.

Q And do you agree that this Stemco Instruments what it was was a manufacturing concern?

A Yes, Stemco manufactured the Auto Coach.

Q Okay. And the Auto Coach products and the viability of the company was dependent upon sales, wasn't it?

A I'm sorry. I didn't understand.

Q Well, you manufactured something. What did you manufacture it for?

A For sale.

Q For sale?

A Yes.

* * *

[p. 27] Q Frank Hunter?

A Yes.

Q Not of Stemco?

A Right.

Q Do you know why he would have sworn that he was?

A No. There was some confusion over the names of the companies.

Q Well, who does Mr. O'Keefe work for, Stemco or Coltec?

A Coltec.

MR. WALL: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

Q (By Mr. Wall) The names are kind of confusing about these companies, is that what you're saying?

A Yes.

Q Because they are pretty intermingled?

A I am saying I have heard the company referred to as Coltec, as Stemco, Stemco Manufacturing, Stemco Instruments and that is what I mean about there seems to be some confusion about the name. The name of the company we're talking about is Stemco Instruments.

Q Wasn't Mr. Atkins employed by Stemco, Inc. (Spelling) I-N-C?

A He was employed by Stemco Instruments.

Q You're sure about that?

A That is my understanding.

[p. 28] Q You're just as sure of that as you're sure that age had nothing to do with his discharge?

A I'm sure age had nothing to do with his discharge.

Q You're just as sure that he was not employed by Stemco, Inc. as you are sure he was employed by Stemco Industries? You're just as sure of that statement?

A My understanding is –

MR. WALL: Non-responding.

THE COURT: Sustained.

A Ask the question again.

Q (By Mr. Wall) You are just as sure of that as you are sure that Mr. Atkins was employed by Stemco Industries and not by Stemco, Inc. age had nothing to do with it?

A Right.

Q If you would take a look at the Interrogatory – you are sure about that?

A It was my understanding, yes.

Q Interrogatory No. 5 those two gentlemen swore to says that Mr. Atkins in fact was employed by Stemco, Inc., not by Instruments. Isn't that what that says?

A Yes.

Q So your understanding is incorrect?

A It may be.

Q Now, at the time you made your decision to lay all of these people off in early 1990 you were aware, weren't you,

* * *

[p. 32] A No, he is not on there.

Q He was reduced down to that force, wasn't he?

A Yes.

Q Do you want to be candid with this jury about your layoff list?

A In what regard?

Q Honesty.

A You bet.

Q How long did you have to prepare this document?

A This is a document that was prepared for this trial. This is not the list that we worked from when we took the action in February of 1990.

Q What happened to that list?

A I don't know. I don't have that list.

Q Did you destroy it?

A No.

Q What did you do with it?

A I don't know.

Q Did it have names on it?

A Yes.

Q Did it look like a birthday list?

A No.

Q Where did you get the list from?

A It was generated by our Personnel people who were familiar with the employees.

* * *

[p. 41] A Yes, she was.

Q Well, your list doesn't include Chris Johns, does it? Your reduced force list doesn't include Chris Johns, does it?

A No.

Q He was eliminated that day, wasn't he?

A Technically he was, yes.

Q So your list twice now is inaccurate?

MR. SCHWARTZ: Objection, Your Honor. Argumentative.

THE COURT: Overruled.

A In my mind no, it is not inaccurate. Chris Johns was hired back that same day on the recommendation of the Regional Manager.

Q (By Mr. Wall) That very same day?

A Yes.

Q That very day?

A Yes.

Q You are sure about that?

A That is my recollection, yes.

Q You're just as sure of that as you are that age had nothing to do with the decision process?

A Yes.

Q Now, you remember your attorney speaking, Mr. Schwartz, about all of these statistics, about percentages of reduced force, etcetera? Do you recall that?

* * *

[p. 43] twelve and eleven or twelve or thirteen, something like that.

Q Oh, but that is only your list?

A That is from my calculations.

Q That is on that list that did not include Chris Jones [sic]?

A Yes, that is the list.

Q And Chris Jones was over forty at the time, correct?

A Yes.

Q And that same calculation was made from that list that included Petra Rohde [sic] who was reinstated and she is under forty, correct?

(Pause in proceedings.)

Q (By Mr. Wall) You need to answer verbally.

A Yes. Excuse me.

Q And that same list doesn't include Roger Marksberry?

A No, he is not on this

Q And he is over forty, too, isn't that right?

A Again I am not sure what his age is.

Q When you were preparing your reduction list you didn't even include theeGeneral [sic] Manager?

A No.

Q He just slipped your mind?

A No, it was by design.

Q It was by design?

A That may be an incorrect statement but he technically worked for Coltec.

[p. 44] Q By design? Is that what you said, sir?

A He technically worked for Coltec Industries.

MR. WALL: Your Honor, I would object. There was no question pending at this point. I move to strike.

THE COURT: Overruled.

Q (By Mr. Wall) You are telling the Court and the jury that Mr. Marksberry was employed by Coltec?

A Yes, he was considered a key executive of Coltec Industries.

Q Since when?

A Pardon me.

Q Since when?

A I wouldn't know when he attained that status.

Q You are sure about that?

A That is my understanding.

Q Do you want to change that testimony?

A No, sir.

MR. WALL: May I approach?

THE COURT: Yes, sir.

MR. SCHWARTZ: Your Honor, I'm going to object. I may be premature but I believe Mr. Wall is going to attempt to impeach the witness with someone else's deposition, not Mr. Norton'sdeposition. [sic] Therefore it is improper.

THE COURT: Well, let's see. I don't know what Mr. Wall plans to do. Overruled at this time.

* * *

[p. 47] to.

THE COURT: Yes, I think is really irrelevant whether the witness believes counsel or not. Sustained.

MR. WALL: All right, sir.

Q (By Mr. Wall) Did you like Mr. Atkins?

A I didn't have any basis to like or dislike him. I didn't know him.

Q When is the first time you met him?

A I met him some time during the year, the last half of '89 at lunch in Longview. I don't remember exactly when that was. That is the first time I met him.

Q And you know that he filed a charge of discrimination about his age after you terminated him?

A Yes.

Q By the way, whose decision was that?

A Which decision?

Q To eliminate Mr. Atkins?

A It was mine.

Q Yours alone?

A Yes.

Q You are sure about that?

A Yes.

Q Just as sure as you are that age had nothing to do with it?

A Right.

[p. 48] Q Could you take a look at Plaintiff's Exhibit 1 up there?

A Okay.

Q Interrogatory 3. It doesn't say just you alone, does it? It says you and Mr. Guffey?

A Which one are you looking at?

Q Interrogatory No. 3.

"State the names of the person or persons who made the decision to discharge the Plaintiff."

A Yes, this says Mr. Guffey and Paul Norton.

Q You and Mr. Guffey?

A That is what this says.

Q Are you suggesting to this jury that your Assistant Secretary and other executives with the company are not telling the truth when they swore to those questions?

A Not at all.

Q Now, Mr. Guffey did participate in that decision, didn't he?

A Mr. Guffey was my boss. He approved the decision, right.

Q Okay. It doesn't say he just approved it, does it? It says he made the decision along with you?

A It says persons who made the decision and it lists both of our names.

Q Okay. It doesn't say he just approved it?

A No.

Q Now, Mr. Guffey is with Coltec?

* * *

[p. 54] Q So between mid January and February the 14th there is nothing attributed to the correction of the Warranty problem?

A There was activity going on but I think the answer to the question would have been no. There was a massive problem. It wasn't something you are going to sole in a couple of weeks.

Q And that Warranty problem preceded Mr. Atkins' involvement?

A It preceded him being hired?

Q Yes, sir.

A I don't know for sure. I sensed that there were Warranty problems before he was hired.

Q Did you eliminate any of the people that were handling the Warranty?

A Again do you mean from a financial standpoint, yes. If you mean from a technical standpoint there were technical people eliminated as well.

Q I was just trying to figure out the criteria that you utilized for the layoff. Was there a criteria? What were the factors that you considered?

A I took a look at the company and I tried to identify job functions that were necessary to make the company survive. Job function by job function I selected people who were the very best to do the job, people that were efficient at it.

Q Is that all?

A Pardon?

* * *

[p. 61] reinstate Mr. Johns to putting Mr. Atkins in his position?

A No.

Q You knew Mr. Atkins was older than Mr. Johns?

A I really don't know – I didn't know at the time he was one of that age.

Q And between the two individuals who had more sales experience, Chris Johns or David Atkins over the years of their life?

A It depends on what kind of sales you are talking about.

Q Common sales.

A I would say Mr. Atkins probably had the most sales management experience. Chris Johns had some unique sales experience.

Q Not management experience?

A Mr. Atkins had more management experience.

Q He had more computer experience too, didn't he?

A I don't know. I just don't know.

Q He had more experience in marketing, didn't he?

A Again I don't know that.

Q He had more experience in calling on customers, didn't he?

A I don't know.

Q He had more experience in consummating sales, didn't he?

A I don't know.

Q He had more experience with dealers, didn't he?

[p. 62] A That is where we feel like – I felt like Chris Johns had stronger experience.

Q Did you ever ask Mr. Atkins?

A I didn't personally, no.

Q Did anyone ever ask Mr. Atkins if he had any experience?

A I don't know.

Q Yet you are suggesting you wanted the very best for the position?

A Yes.

Q But you don't even know if he can do it?

A Oh, yes, we knew Chris Johns was experienced.

Q He had only been there a month?

A He had had experience selling higher product.

Q Not this Auto Coach line?

A Yes.

Q When did the Auto Coach line come out?

A Well, it was born, if you want to call it that, the concept back in the mid eighties. It had evolved over time.

Q But this particular product that you were selling, when was it devised?

A I don't know. I would guess again in the mid to late eighties.

Q And you wanted the very best for the job?

A Yes.

Q Do you know how many technical problems with the [p. 63] equipment Mr. Atkins was responsible for rectifying?

A No.

Q Do you know how many dealer complaints Mr. Atkins was responsible for rectifying?

A No.

Q Do you know how many Warranty problems Mr. Atkins was responsible for rectifying?

A No, I don't.

Q Do you know how many customer complaints Mr. Atkins handled himself?

A No, sure don't.

Q Certainly when you all were preparing to shut this business down you wouldn't have written a script for your employees on what to tell people if they called, would you?

A We didn't shut it down.

Q Well, when you sold the business?

A When we sold the business?

Q When did you all sell the product line?

A Late in January of this year.

Q Well, in October of '92 you knew you were going to sell the business, didn't you?

A No, I didn't know that. We looked at – we were looking at our options about that time. We were not satisfied with the performance of the business.

Q Certainly you wouldn't have written anyone at Stemco

* * *

[p. 65] MR. WALL: I understand, Your Honor.

It bears upon the veracity of the stated reason. I expect that the offer of proof will establish they would tell people things over the phone about the reasons –

THE COURT: They being who?

MR. WALL: The Defendants.

THE COURT: Be more specific. As I understand it there were only two decision makers involved here so I am not sure that what the Defendants generally told people over the phone is relevant. I think we're going to have to be more specific than that.

MR. WALL: That the Defendants had instructed their employees how to handle phone inquiries about the viability of the company and the decisions regarding other layoffs and that some of the reasons given with respect to all of this – that the reason given with respect to all of this – that the reason given with respect to all of this are not true. It just bears upon the issue of credibility.

THE COURT: Well, as a facial matter it seems a little implausible to me that the Defendants would go to such lengths a year and a half after the operative events gear to mislead anyone. Can you suggest why they would do that? I mean to me that does not have a ring of credibility to it as a general proposition.

MR. WALL: Well, they – there are a number of

* * *

[p. 78] had a very strong market share and very viable reputation in the truck products market and we were beginning to get a reputation from the product problems that Stemco Instruments was having and it could have potentially hurt us and that was a key to us as well as the financial impact and of course the loss of reputation for Stemco Instruments itself.

Q (By Mr. Schwartz) Okay. So you knew about the financial problems and you knew about the product problems and so in January, 1990 this baby falls into your lap?

A Yes.

Q All right. What was the first step you took?

A The first thing I did was to take a look at the financial records of the company and see exactly what the situation was. I had heard rumors but I didn't know until I looked at the financial documents.

Q Okay. And what specific financial documents did you look at?

A I looked at things like the income statements and the documents to support the income statements, the detail in manufacturing, in selling and general administrative expenses of the business. See that income statement determines profit and loss.

Q Mr. Norton, if you could look in the binder in front of you at Defendants' Exhibits Nos. 1 and 2 and can you first of all identify Defendants' Exhibit No. 1?

[p. 79] A Exhibit No. 1 is a Month by Month and Year Total Income Statement for 1988 Stemco Instruments.

Q Okay. And if you could look at Exhibit No. 2 and tell me what that is.

A It is the same type of document for 1989.

Q And were these two of the documents you relied upon when you were first investigating the problems with Stemco Instruments?

A Yes, that is correct.

Q Mr. Norton, are Defendants Exhibits 1 and 2 kept within the regular course of business of Stemco Instruments and Stemco, Inc.?

A Yes, they are.

Q And is it within the regular course of business for Stemco, Inc. and Stemco Instruments to keep such documents?

A Yes, it is.

Q And were they made by a agent or representative or employee of Stemco, Inc. or Stemco Instruments at or near the time of the dates reflected therein?

A Yes, it was.

Q And is this a true and correct copy of the original?

A Yes, they are.

MR. SCHWARTZ: Your Honor, at this time Defendants move that Defendants Exhibits 1 and 2 be admitted into evidence.

* * *

[p. 100] Q They are not employees of the company?

A No, they are not.

Q So when you made your decision what did you decide on the sales function about these sales representatives?

A I decided to lay them off.

Q All of them?

A Yes, all of them.

Q And what did you decide about the Supervisor Mr. Atkins?

A I decided to lay him off.

Q Who decided in the Engineering and the Manufacturing functions which employee would be laid off and which employee would stay?

A I did.

Q Anyone else?

A No.

Q Who made the decision as to all the layoffs?

A I did.

Q I believe Plaintiff's counsel showed you an interrogatory regarding who made the decision –

A Right.

Q – in which Mr. Guffey's name and your name appear?

A Yes.

Q What role, if any, did Mr. Guffey play in the decision to discharge these people?

A Mr. Guffey was my boss and he had approved my plan to [p. 101] reorganize the company and lay people off.

Q With respect to the manufacturing and the engineering functions what criteria did you consider in deciding who was going to stay and who would have to be let off?

A With respect to Manufacturing it was the assemblers, the people who put the parts together we decided to keep and the rest would be laid off.

With respect to Engineering it had to do with the expertise of the people. I selected the people I felt that were capable of solving the problems and would be the best for future development and to do that efficiently.

Q But with respect to the sales area were you forced to make individual decisions on who would be laid off and who would stay?

A I laid them all off.

Q Regarding the number of employees – you said it was forty around January 1, 1990. After you made all these decisions what did that take you down to?

A About fifteen.

Q How were the affected employees notified of your decision?

A The people in Longview were met with by the Personnel Manager for Stemco and the Operations Manager for Stemco Instruments Mr. Guffey.

Q What about the persons in Dallas?

[p. 102] A The persons in Dallas were met with by Mr. Guffey and myself and our Personnel Vice President. Mr. Guffey talked to three of the people, the three most senior and the Personell [sic] Director and I talked to the others.

Q And Mr. Guffey is your boss?

A Yes, he is.

Q And he talked with Mr. Marksberry and with Mr. Atkins?

A Yes.

Q And do you recall the third one?

A I believe it was Mr. Beckham.

Q With respect to the employees you spoke with what did you say, what did you tell them?

A I told them the actions we were taking we were going to reorganize the company because of the losses we had sufffered [sic] and we were trying to put it in a more favorable financial position and fix the product problems and we were taking action because of those things.

Q And these notifications of layoffs weereon [sic] February 14th, 1990?

A Yes, they were.

Q Now, what, if anything, after February 14th, 1990 changed regarding your decision you made in the sales area?

A Well, we made the decision to bring Chris Johns back. When I named Tom Diefenbaker, Vice President and General Manager, he recommended to me we needed someone to communicate [p. 103] between Stemco Instruments and the network of dealers or distributors we had and we selected Chris Johns because he had worked for a distributor and had sold our product and he had intimate knowledge of how a distributor functioned and what the

distributor's needs were as well as how our product performed.

Q Okay. Let's start a little bit over here. Chris Johns was a salesman for Stemco Instruments?

A Yes, he was.

Q And he along with the other salesmen and Mr. Atkins and the other sales representatives was discharged on the 14th?

A That is correct.

Q Okay. Who is Tom Diefenbaker?

A Tom Diefenbaker is the man I named to be the Vice President and General Manager of Stemco Instruments after – on February 14th, 1990.

Q He took Mr. Marksberry's place?

A Yes.

Q Now, Mr. Diefenbaker came to you and asked what?

A He recommended that we keep Chris Johns because of his expertise with distributor sales.

Q When did this occur?

A It happened all in the day of February 14th, 1990.

Q All of this happened the same day you were down there notifying the employes [sic] that they were being laid off?

[p. 104] A Yes.

Q Did Mr. Diefenbaker give you any reason for his recommendation that Chris Johns be retained?

A Yes, he did.

Q What were those reasons?

A We knew we needed to depend on the distributor network for our sales effort and we needed someone to be an interface between Stemco Instruments and dealer network and Mr. Johns had those unique talents.

Q What, if anything, did Mr. Diefenbaker tell you regarding Mr. John's experience as a distributor?

A He told me that –

MR. WALL: Objection. Hearsay.

THE COURT: Sustaiinedwith [sic] some exception to the hearsay rule.

MR. SCHWARTZ: Your Honor, I would argue that this is not hearsay. We are not going into the truth of the matter further. Mr. Diefenbaker is recommending that Mr. Johns be retained. He is seeking Mr. Norton's approval for that. Mr. Norton took this information and I believe the evidence will show and granted approval. This is the information that this man was relying on. At this point in time I am not going to the truth of the matter further. I just want to get the information that he relied upon in making his decision.

THE COURT: All right. With that explanation I will [p. 105] modify the ruling announced just now and permit this testimony but instruct the jury that they should consider it only in determining what information

Mr. Norton relied on in making his decision to reemploy Mr. Johns but not for the truth of what was stated about Mr. Johns.

Q (By Mr. Schwartz) Mr. Norton, what did Mr. Diefenbaker tell you about Mr. Johns' prior experience with working for a distributor?

A He told me that Mr. Johns had worked for Zebco, one of our distributors, for about three years and that he had had experience selling our product and had knowledge about the product and what the distributing needs are and that type of thing.

Q What position did Mr. Johns hold before February 14th, 1990 when he was initially let go?

A I think the title had something to do with sales. He was a salesman.

Q What position was he retained or unfired to do after February 14th, 1990?

A He was a salesman to man our dealer salesmen.

Q To you [sic] knowledge when he was – the day before he was fired ānd the day after he was rehired did his job change any?

A Not significantly, no.

Q Did you know Chris Johns before February 14th, 1990?

A No.

[p. 106]-Q Had you ever met him?

A I don't recall ever meeting him.

Q Okay. At that time did you [sic] how old he was?

A No, I had no idea.

Q Okay. What did you decide ultimately about Mr. Diefenbaker's request to retain Mr. Johns?

A I approved it. I thought it made sense.

Q And what was your understanding at the time you approved it that Mr. Johns would be doing?

A He was to be a liaison [sic] with our current distributors and thereafter to sell the product and support existing customers. He was not to prospect for new sales.

Q That was your understanding as of February 14th, 1990?

A That was the instructions.

Q AfterFebruary [sic] the 14th, 1990 did Mr. Chris Johns –

MR. SCHWARTZ: I am sorry. Strike that. Let's get some dates set here.

Q (By Mr. Schwartz) Did Chris Johns, did he stay with the company until January of last year?

A January of '92.

Q I am sorry. '93 when the company was sold?

A No.

Q When did he leave the company?

A He left the company in the fourth quarter of 1992.

Q Say about November of '92?

* * *

[p. 109] lists were prepared when you were actually making this decision. Did you have a list of terminated or laid off employees when you were actually making that decision?

A Yes.

Q Okay. That list is not in front of you, correct?

A No, it is not.

Q Did that list contain either the birth date or the ages of the persons who were being laid off?

A No, it did not.

MR. WALL: I object. The best evidence would be the document itself.

THE COURT: I overrule the objection.

Q (By Mr. Schwartz) Why did you lay off Mr. Atkins?

A We had no need for his job function any more. We had no sales force, no sales support activity.

Q Any other reason?

A That is all.

MR. SCHWARTZ: Your Honor, may I approach the witness?

THE COURT: Yes, sir.

MR. SCHWARTZ: Do you have one of the exhibits you had marked when you questioned him earlier?

MR. WALL: Exhibit 17.

MR. SCHWARTZ: 17 is the list that was attached to the interrogatory?

* * *

[p. 119] PAUL HOLMES NORTON – REDIRECT

THE COURT: Yes, sir.

Q (By Mr. Wall) Two million two hundred and fifty-eight thousand dollars minus four hundred and twenty thousand dollars leaves a million eight hundred and thirty-eight thousand dollars?

A Yes.

Q Were you trying to get to the bottom of this?

A Yes.

Q Where did that million eight hundred and thirty-eight thousand go?

A That is the expense associated with promoting the product, expenditure of sales force, sales force staff and other activities like advertising we incurred.

Q How much was advertising?

A I don't know.

Q How much was the sales support staff?

A Oh, they were like three or four employees.

Q And how much were they making?

A They would have been again less than Mr. Atkins. Salary is an important of it certainly and all the expenses and selling expenses.

Q Well, we got a million eight hundred thirty-thousand left.

A I think we got a problem.

Q With the accounting?

[p. 120] A No, with whoever was responsible for the sales force, the sales activities.

Q Well, where did that million eight hundred thirty-eight go?

A It was spent.

Q Now, where does the warranty come up on these exhibits?

A The warranty should come up here in other manufacturing costs.

Q Other manufacturing costs?

A Yes.

Q What all goes into that category besides warranty?

A That would be one of the main ingredients. I couldn't identify them all.

Q We don't have the documents? These were comprised from something else, weren't they?

A They were supporting documents, yes.

Q And we don't have those here, do we?

A I don't have them with me.

Q And you didn't ask to review the underlying documents. You just took a look at these?

A I reviewed the underlying documents when I made the decision.

Q Oh, when were these prepared, Defendant's Exhibits 1, 2 and 3?

A They would have been prepared in the time frame that they [p. 121] represent.

Q Your computer doesn't put any date on any of these things?

A There is no date on this particular one.

Q The one of 1988 says it is revised. It is revised from what?

A Evidently a minor modification at the time.

Q When was it revised?

A It would have been revised somewhere around the end of 1988 or early 1989.

Q Your 1989 doesn't even have a computer written down. It looks like a whiteout, doesn't it?

A Yes.

Q And there is something handwritten onnthere [sic]?

A Yes, the date is handwritten on there.

Q Your computer doesn't print dates?

A Our computer prints dates.

Q Why would use the handwriting on there?

A Evidently that one is illegible.

Q And also the 1990 was illegible too, wasn't it?

MR. SCHWARTZ: Objection, Your Honor, unless Mr. Wall will stipulate that Defendant's Exhibit Number 3 comes into evidence.

THE COURT: Sustained.

Q (By Mr. Wall) Did you find something on your 1990 as

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE DAVID ATKINS	Civil Action No. 3:92-CV-0443-G
vs.	
COLTEC INDUSTRIES, INC., f/k/a, COLT INDUSTRIES, INC. and STEMCO, INC.	Dallas, Texas February 10, 1993 9:30 a.m.
	(Filed June 4, 1993)

VOLUME III
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE A. JOE FISH,
UNITED STATES DISTRICT JUDGE
and a Jury

APPEARANCE:

For the Plaintiff:	John E. Wall, Jr. Attorney at Law 3109 Carlisle, Suite 103 Dallas, Texas 75204 (214) 871-8808
For the Defendant:	Mark E. Schwartz Andrews & Kurth Texas Commerce Tower Houston, Texas 77002
Official Court Reporter:	Deborah M. Roberts, CSR 419 United States Courthouse 501 West 10th Street Fort Worth, Texas 76102-3637 (817) 334-2082

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

[p. Vol. III-93] reach those issues as to whether or not he's qualified to assume the other positions. But even if we were to, the evidence in this case is very clear that Mr. Atkins' long history makes him imminently more qualified for almost all of the positions that were available there, including Mr. Diefenbaker, including Mr. Johns, including the other individuals who were under 40 and were retained and were somehow reorganized to try to avoid some sort of problem.

And that in a nutshell is the position. Thank you, Your Honor.

THE COURT: Thank you, Mr. Wall.

The Supreme Court and the Fifth Circuit in a large number of cases have discussed the burden of producing evidence that a plaintiff in a disparate treatment employment discrimination case has to make a prima facie case, and Mr. Schwartz has correctly stated, I think, the elements here.

First, that the plaintiff was a member of the protected group. And I believe it is undisputed and indeed even stipulated that the plaintiff was over 40 at all relevant times in this case and therefore is a member of the class protected by the Age Discrimination and Employment Act.

The second element is that there was some adverse employment decision taken against the plaintiff, and, again, I think that it is undisputed in this evidence that

such a decision was made by Stemco affecting Mr. Atkins; namely, his [p. Vol. III-94] layoff or termination.

That brings us to the third element that is really the basis of the defendant's motion, and that is whether there was another position available in the defendant's organization for which Mr. Atkins was qualified.

I am in agreement with Mr. Schwartz to a limited extent, and that is I do not think there is much evidence supporting the plaintiff's claim in this case. In fact, were I a juror in this case and the case were submitted to me at this stage, I would easily find in favor of the defendants.

That's not the test, however, for a motion such as this. Rather, my task is to decide whether there is any evidence on which a reasonable fact finder could make a decision in favor of Mr. Atkins, and I am reluctant to say as a matter of law at this time that no reasonable fact finder could find in favor of the plaintiff. On reflection and after fuller consideration of the record, if a verdict were returned by the jury in favor of Mr. Atkins I might yet be able to reach that point, but today having this much time invested in the case, it seems to me that it would be more prudent for us to make a full record so that the jury which has been impaneled can render its decision in the case.

Another reason for my adopting this course is the statement by the Fifth Circuit, I believe in the Thornbrough against the Greenville – Columbus and Greenville Railroad [p. Vol. III-95] Company, that the prima facie case a plaintiff must make is not a platonic form which is constant and unchanging. And the Court went on to say

that the elements of a prima facie case may vary somewhat according to the factual circumstances.

Like this case, that one was an age discrimination claim arising in the context of a reduction in force, and so I am loath to take too rigid a posture regarding the elements of a prima facie case.

Moreover, the Supreme Court has said that these elements of a prima facie case are really simply a means of organizing and analyzing the evidence, and once a prima facie case has been made and the defendant has articulated a legitimate nondiscriminatory reason for its adverse employment action against the plaintiff, then these shifting burdens of proof on – first on the plaintiff and then on the defendant disappear, and I think that has happened here.

If I give the plaintiff the benefit of the doubt that he has made a prima facie case, I think the defendant has articulated a legitimate nondiscriminatory reason for its decision to lay off Mr. Atkins.

And that presents us then with the ultimate issue in the case, which is did the defendant intentionally discriminate against Mr. Atkins on account of his age. And although I think the evidence on that point is also weak, I am not prepared to say that it is nonexistent, or that it is so [p. Vol. III-96] lacking in probative force that no reasonable fact finder could render a verdict in favor of Mr. Atkins.

Consequently, for these reasons, I am going to deny the defendant's motion for directed verdict at this time. However, if there is a verdict in favor of Mr. Atkins, I

may want to reconsider my decision at the appropriate time after a verdict is returned, and so this may not be the final word on this issue.

Are you ready to proceed with your evidence, Mr. Schwartz, after we bring the jury back?

MR. SCHWARTZ: Your Honor – yes, Your Honor. If I could indulge the Court, if we could have five minutes, I will – you have my representation that that five-minute investment, if I have a chance to talk with my co-counsel and client, will expedite the trial of this matter.

THE COURT: You say five minutes?

MR. SCHWARTZ: Yes, Your Honor.

THE COURT: All right. We'll be in recess until 1:25.

(Recess from 1:15 p.m. to 1:35 p.m.)

THE COURT: Ladies and gentlemen, the plaintiff has rested, which means that he has presented all of the evidence that he wishes us to consider in support of the claim he has made in this case.

You will remember I told you in the beginning when I was [p. Vol. III-97] discussing with you the order of our proceedings, that after the plaintiff had presented all of his evidence, that the defendants would have the opportunity to present any evidence they wish us to consider, and we are now at that point in the case.

Mr. Schwartz, who will be the plaintiff's – excuse me, the defendant's first witness?

MR. SCHWARTZ: Your Honor, the defendant rests.

THE COURT: Evidently the defendants have also presented all of the evidence they wish us to consider, ladies and gentlemen.

The next step in our proceedings, as I told you in the beginning, will be for counsel to have an opportunity to address you again in what is called closing argument or summation, and then I will give you my instructions on the law. However, because I plan to reduce those instructions to writing, I don't have them ready now, and it will probably take me the rest of today and overnight to get them in final form.

Therefore, to avoid any unnecessary inconvenience to you, I think it would be best if we recessed for the balance of today and probably even for tomorrow morning so that when you come back we will be ready to present the case to you for decision.

I'm going to ask, therefore, that you come back at 1:00

* * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE DAVID ATKINS vs. COLTEC INDUSTRIES, INC., f/k/a, COLT INDUSTRIES, INC. and STEMCO, INC.	: : : : : : :	Civil Action No. 3:92-CV-0443-G Dallas, Texas February 9, 1993 9:35 a.m.

VOLUME II
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE A. JOE FISH
UNITED STATES DISTRICT JUDGE
and a Jury

(Filed Jun. 4, 1993)

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

[p. 51] THE COURT: Sustained.

BY MR. WALL:

Q. Did you give him a proposal for a buyout?

A. Yes.

Q. Did you-all have discussions about the proposal?

A. Yes.

Q. Did he say anything negative during any of these discussions that would indicate to you an animus towards persons over 40?

A. Yes.

Q. For instance?

A. In discussing the financial models we were using for the buyouts, while we were getting the sales up there was some negative cash flows, and so he discussed with us in detail about how to reduce negative cash flows in companies. And he said – he told me that the most effective method in – was to reduce head count, because that's your most expensive thing, and the best way to do that, get rid of your older workers because they cost the most because they had the highest benefits, most wages.

Q. Did he boast about having previously done this?

A. Yes, he did.

Q. How?

A. He said that, in fact, he effectively had done it in the past and, in fact, at two union operations.

[p. 52] Q. Did he indicate where?

A. No – well, he's out of the New York area.

Q. When did that occur in relation to your termination?

A. It occurred about January 29th.

Q. The meeting with Mr. Guffey?

A. Yeah, that particular meeting where he said that in '89 – I mean '90, January 29th, '90.

Q. At any time prior to February the 14th of 1990, did anyone complain to you about any of your sales expenses?

A. No.

Q. Did Mr. Marksberry complain to you about sales expenses?

A. No.

Q. Mr. Norton or Mr. Guffey or any of those?

A. No.

Q. How were your first advised of your termination?

A. Mr. Guffey said he was prepared to meet with us on the sale of the company, and we were led to believe to consummate the sale of the company.

MR. SCHWARTZ: Objection, Your Honor, non-responsive to his question about how he was advised of the termination, and again it's not relevant.

THE COURT: Sustained.

BY MR. WALL:

Q. What was your reason for – did you have a meeting with Mr. Guffey on the 14th?

[p. 53] A. Yes.

Q. And what was the stated reason for the meeting?

A. To consummate the sale of the employee group.

Q. And who all was that?

A. Jerry McCombs, Roger Marksberry, myself and John Guffey.

Q. And was Mr. McCombs, did he have any reason to be there as an employee?

A. Mr. McCombs was not an employee. He was an outside financial consultant we had been using to help prepare the plans and arrange financing.

Q. So he wouldn't be reporting to that facility to go to work is what you're telling me?

MR. SCHWARTZ: Objection, Your Honor, leading.

THE COURT: Sustained.

BY MR. WALL:

Q. Any reason why Mr. McCombs would be there?

A. The reason he was invited was because he was part of the employee purchase group.

Q. What was said to you on that day by Mister – or what happened that day?

A. When the three of us were there and Mr. Guffey came in and sat down at the head of the table, and he said, "Instead of selling you the company, I've decided to close it down."

Q. And what happened?

A. Mr. McCombs said, "I don't have any business here."

* * *

NO. 94-903

JAN 6 1995
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GEORGE DAVID ATKINS, *Petitioner,*
vs.
COLTEC INDUSTRIES, INC.,
f/k/a COLT INDUSTRIES, INC.,
and STEMCO, INC., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR COLTEC INDUSTRIES, INC., f/k/a COLT INDUSTRIES, INC., and STEMCO, INC. IN OPPOSITION

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I.

QUESTIONS PRESENTED

1. Whether the Fifth Circuit's holding that, "the evidence presented at trial overwhelmingly demonstrates that the [Respondents] did not discriminate against [Petitioner] on the basis of age," is supported by the record. [Pet. App. at 2]

2. Whether the Fifth Circuit's judgment should be reviewed on writ of certiorari when neither the burden-shifting procedural device nor the issue of pretext was applied by or relied upon by the Fifth Circuit in affirming the district court's judgment as a matter of law in favor of Respondents.

3. Whether the issue of "pretext plus" should be reviewed on writ of certiorari in this case when the Fifth Circuit did not apply any "pretext plus" standard.

4. Whether the issue of "pretext plus" is relevant when a plaintiff in an employment discrimination case fails to offer any evidence disputing an employer's legitimate nondiscriminatory reason for discharging the plaintiff.

II.

LIST OF AFFILIATED COMPANIES

Divisions, Subsidiaries and Parent Company of Coltec Industries, Inc., f/k/a Colt Industries, Inc. and of Stemco, Inc.

- All of the affiliated companies of Coltec Industries, Inc., f/k/a Colt Industries, Inc. are wholly owned by Coltec Industries, Inc.

- Stemco, Inc. is a wholly-owned company. The only company with which Stemco, Inc. is affiliated that is not wholly owned is Coltec Industries, Inc., which is the parent company that wholly owns the parent company of Stemco, Inc.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

NO. 94-903

GEORGE DAVID ATKINS,
Petitioner,

vs.

COLTEC INDUSTRIES, INC., f/k/a COLT INDUSTRIES, INC.,
and STEMCO, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR COLTEC INDUSTRIES, INC., f/k/a COLT INDUSTRIES, INC., and STEMCO, INC. IN OPPOSITION

OPINIONS BELOW

Pursuant to Local Rule 47.5, the Court of Appeals for the Fifth Circuit determined that its opinion affirming the district court should not be published.

5th Cir. R. 47.5. The content of the Fifth Circuit's unpublished opinion, however, is reprinted in the appendix of Petitioner's Petition for Writ of Certiorari. [Pet. App. at 1-12][1]

Likewise, the district court did not publish its memorandum order granting Respondents' motion for judgment as a matter of law. The district court's memorandum order is reprinted in the appendix of Petitioner's Petition for Writ of Certiorari. [Pet. App. 13-26]

JURISDICTION

Petitioner invokes the jurisdiction of the Court pursuant to 28 U.S.C. § 1254 (1).

1/ Citations to Petitioner's Petition for Writ of Certiorari are referred to as "Pet.," followed by the page number. Citations to the appendix included with the Petition for Writ of Certiorari are referred to as "Pet. App.," followed by page number. Citations to the Record are referred to as "Rec.," followed by the volume and page number of the Record. Citations to Plaintiff's Exhibits are referred to as "PX," and Defendant's Exhibits are referred to as "DX."

STATEMENT OF THE CASE

A. *Background Facts.*

This Age in Discrimination Act ("ADEA") case arose out of Stemco Instruments' reduction-in-force that was necessitated by its unsuccessful attempts to market a product line called *AutoCoach*. Coltec Industries, Inc. is the parent company of various Stemco companies and divisions. [Rec. IV at 22, 89] *AutoCoach* was a computer produced by Stemco that was used onboard in commercial trucks. The purpose of *AutoCoach* was to record and monitor driving activities, such as the shift pattern of the driver, the speed of the driver, the number of brake applications, the idle time of a truck's engine, and other such information. [Rec. V at 35-36] By monitoring such activities, *AutoCoach* assisted trucking operations in reducing operating expenses. [Id.]

Stemco marketed *AutoCoach* through two separate avenues: (i) it was sold directly to the customers or end users ("direct sales"); and (ii) it was supplied on a national basis to distributors ("distributor

sales"). [Rec. IV at 75; Rec. VI at 30-33] Distributors were essentially middlemen between Stemco and the ultimate customer for the *AutoCoach*. [Id.] The advantage to Stemco of using distributors was that the distributors maintained their own sales forces to market *AutoCoach*, thereby relieving Stemco from many of the expenses associated with selling the product. [Id.] Through the two avenues of marketing, companies that wanted to utilize the *AutoCoach* could purchase it from a distributor or directly from Stemco. [Id.]

AutoCoach suffered from significant engineering and warranty problems. [Rec. IV at 77, 91-93; Rec. V at 42] These engineering and warranty problems largely contributed to Stemco's financial problems. [Rec. IV at 77, 78] For instance, in 1988 Stemco recorded sales of over $5 million, *but suffered a net loss of over $1.8 million*. [Rec. IV 81-82; DX 1] During 1989, the financial problems worsened with *sales decreasing* to $3.54 million and *net losses increasing* to almost $3.1 million. [Rec. IV at 86-88; DX 2]

It was during this period of worsening financial conditions that Stemco hired Petitioner, David Atkins, as its National Sales Manager. [Rec. V at 46] Atkins was 47 years of age at the time he was hired by Stemco in July 1989. [Rec. V at 74] According to Atkins, when he joined Stemco he knew nothing about it or the *AutoCoach* product. [Rec. V at 75] Several months following his employment by Stemco, Atkins became its Director of Sales and Marketing. In that role, Atkins testified that he supervised all of Stemco's salespersons and sales support personnel, and supervised the development of the Company's direct sales marketing plan. [Rec. VI at 35-39]

When Atkins joined Stemco, 70% of its *AutoCoach* sales were distributor sales. [Rec. VI at 32] With no background in distributor sales, much less distributor sales of *AutoCoach*, Atkins focused his attention on direct sales. [Rec. V at 39-41] To this end, Atkins devoted 85% to 90% of his time supervising the Company's salespersons. [Rec. VI at 37-38] Less than seven months after Atkins joined Stemco, and at the

time he was terminated, sales through distributors had decreased from 70% of all sales to 50% of all sales. [Rec. VI at 32]

Because of the financial losses suffered by the Company, in January 1990, Paul Norton was assigned the position of Stemco's president. [Rec. IV at 16, 72, 76, 88] As part of this assignment, John Guffey, who was the President of the Coltec Group, told Norton to take any steps necessary to stop the financial hemorrhaging of Stemco. [Rec. IV at 76, 89] Consequently, Norton was faced with making some tough decisions: should he shut Stemco down? sell it? reorganize it? expand sales? decrease sales? or cease sales? [Rec. IV at 76-77]

To form a better picture of what to do with the Company, Norton first looked at the financial records of the Company to try to get a better idea of where some of the financial problems lay. [Rec. IV at 78] As he reviewed the financial records, Norton discovered, among other things, that the selling expenses for the

product were far out of balance with sales, which was a big concern to Norton. [Rec. IV at 81-91]

Norton then reviewed the Company's warranty records to gain a better idea of the warranty problems. [Rec. IV at 88] Norton also looked at personnel information and talked to the Vice President of Personnel about the employees, their various job functions, and their capabilities. [Rec. IV at 88] Norton's investigation included a meeting with Stemco's Vice President of Finance to discuss the financial condition of the Company. [Rec. IV at 89] After he investigated, Norton concluded that the Company's problems involved engineering defects in its products, and involved selling expenses beyond the level that sales could support. [Rec. IV at 91]

Based on his investigation, in late January or early February 1990, Norton decided to reorganize the Company rather than close it, operate it as usual, or expand it. [Rec. IV at 90] Norton decided against closing the Company because he feared it would adversely affect the relationships between customers

and other Stemco companies. [Rec. IV at 91] In other words, Norton did not want customers to perceive Stemco as having "bailed out" on them. [Id.] Leaving operations "as is" made no sense, considering the enormous losses the Company had been suffering. [Id.]

Norton's decision to reorganize the company and reduce expenses necessarily entailed a workforce reduction -- there simply were too many people to support the level of sales. [Rec. IV at 93] Accordingly, Norton looked to see where the workforce could be reduced. In accomplishing this end, Norton *completely eliminated* Stemco's Finance Department, reducing force by four or five people. [Rec. IV at 94-95] Next, Norton eliminated *all* of the staff or management of the manufacturing arm of Stemco, retaining only the assemblers who actually put the product together. [Rec. IV at 96, 101] Norton reduced force in the Engineering Department because he felt that the company had too many engineers. [Rec. IV at 97-98] Based on the advice of others, Norton retained only the highest ranked

engineers who could best address the *AutoCoach's* engineering problems. [Rec. IV at 98, 101]

Finally, Norton took a look at the sales area, which was headed by Atkins. [Rec. IV at 98] In this connection, Norton concluded that "it was suicide to continue to introduce products that had a problem in the marketplace." [Rec. IV at 99] Because Norton did not know how long it would take to correct the *AutoCoach's* problems, he decided to reduce marketing efforts until the problems were corrected. [Id.] Norton recognized that he could reduce expenses if he eliminated the sales force until such time as the product was ready to be marketed heavily again. [Id.] Norton recognized that he could eliminate the sales force without shutting down the Company by marketing the product strictly through distributors. [Id.] In this way, Norton believed that costs could be reduced, because the distributors maintained their own sales forces, leaving Stemco free of most expenses associated with sales. [Id.]

Although Norton made the decision to reduce the workforce, including elimination of the direct sales function, he sought approval of his decision from his boss, John Guffey. [Rec. IV at 99-101] Guffey did not, however, become involved in identifying the persons and functions to eliminate. [Rec. IV at 100-101] In all, 24 of the approximately 40 Stemco employees were laid off as a consequence of this reorganization. [Rec. at 93, 94, 101] On February 14, 1990, the Personnel Vice President, along with Guffey and Norton, met with the people who were subject to the reduction-in-force to discuss with them the termination of their employment. [Rec. IV at 101-102]

Chris Johns was one of the members of the sales division that was discharged in connection with the reduction-in-force. [Rec. IV at 103] The new Vice President and General Manager, however, suggested to Norton that Johns be retained or rehired to serve as the Company's liaison with distributors. Retaining Johns made sense because of Johns' background and experience dealing with the *AutoCoach* product line

and with distributors. [Rec. IV at 102-105] Johns had worked for one of Stemco's distributors for about three years, and during those three years had gained valuable knowledge and experience selling Stemco's product. [Rec. IV at 105] Accordingly, Johns had the knowledge about the product and needs of *AutoCoach* distributors that enabled him to be the liaison Stemco needed between it and its current distributors. [Rec. IV at 106] In addition, with Johns' knowledge of the product, he could service Stemco's existing customers. [Id.] Johns, however, was not retained to "prospect for new sales." [Id.] With the retention of Johns, he continued to perform essentially the same functions that he had performed prior to the reduction-in-force. [Rec. IV at 105-106] Following the reduction-in-force, there was no sales support activity. [Id.]

The Company never was able to hire any new sales representatives. [Rec. IV at 108] Other employees eventually left the Company, including Johns and the new Vice President and General

Manager. [Id.] Eventually, the product line was sold. [Rec. IV at 203]

During trial, Norton testified unequivocally that age was not a factor in his decision to effect the reduction in force, and it was not a factor in the decision to terminate the employment of Atkins. [Rec. IV at 108, 113] Moreover, age was not a factor in the decision to retain Johns -- Norton had no knowledge of Johns' age and had never even met Johns when it was suggested to and agreed to by Norton that he retain Johns. [Rec. IV at 105-106]

B. ***Proceedings In The Courts Below.***

Because Atkins failed to present legally sufficient evidence such as would meet or support his burden of making a *prima facie* case of age discrimination, at the close of Atkins' evidence, the Company moved for judgment as a matter of law under Rule 50, FED.R.CIV.P. [Rec. VI at 89] In response to the Company's motion, the district court stated that it did "not think there [was] much evidence supporting the plaintiff's claim in this case." [Rec. VI at 94]

Nonetheless, the district court denied the motion and elected to let the case proceed, stating, "if a verdict were returned by the jury in favor of Mr. Atkins [the Court] might yet be able to reach that point [of entering judgment as a matter of law], but [] having this much time invested in the case, it seem[ed] to [the Court] that it would be much more prudent for [it] to make a full record so that the jury which [ha]d been impanelled [could] render its decision in the case." [Id.]

Knowing that Atkins failed to meet his burden under the ADEA, Stemco went ahead and rested without calling any witnesses. [Rec. VI at 97] The jury returned its verdict in which it found age a determining factor in the Company's decision to discharge Atkins, but did not find that Stemco willfully violated the ADEA. [Rec. II at 330, 333]

Because the facts and evidence presented at trial so wholly failed to support any notion of ADEA violations, and because the evidence was legally insufficient to support the jury's verdict, the Company, at the invitation of the district court, renewed its

motion for judgment as a matter of law. [Rec. II at 227] This time, the district court granted the motion and entered judgment as a matter of law against Atkins. [Rec. II at 385, 398]

In an unpublished opinion, the Fifth Circuit affirmed the district court's judgment in favor of Respondents, finding that "the evidence presented at trial overwhelmingly demonstrates that the defendants did not discriminate against Atkins on the basis of age...." [Pet. App. at 2] In reaching this conclusion, the Fifth Circuit stated that because the case was fully tried, there was no need to review it under the burden-shifting procedural devices relied upon typically in its review of appeals from summary judgments. [Pet. App. at 7] Rather, the Fifth Circuit looked at the record as a whole "to determine whether the record contain[ed] evidence upon which a reasonable fact-finder could have concluded that Atkins proved by a preponderance of the evidence that Stemco intentionally discriminated against him on the basis of age when it discharged him." [Id.]

SUMMARY OF THE REASONS THE PETITION SHOULD BE DENIED

A. *The Fifth Circuit Did Not Resort To Analyzing This Case From Any Burden-Shifting Procedural Device, And Thus Never Reached The Issue Of Pretext Or Pretext Plus.*

Atkins states that the Fifth Circuit arrived at its unpublished decision in this case by misapplying a "pretext plus" standard, a standard that he contends has been rejected by courts of appeals in other circuits. [Pet. at 10-20] To arrive at such a contention, Atkins ignores the content of the Fifth Circuit's opinion, wherein the Fifth Circuit not only did not reach or address any issue of pretext or pretext plus, it expressly stated that a fully-tried case such as this *would not* be reviewed under such burden-shifting procedures. [Pet. App. at 7]

There is a reason for Atkins' mischaracterization of the Fifth Circuit's opinion, however -- he is attempting to create an impression on the part of this Court that the Fifth Circuit's unpublished opinion represents a split in authority among the circuits. Whether any such split actually exists among the

circuits with respect to the issue of pretext or pretext plus, however, has no relevance with respect to *this* case because the Fifth Circuit and the district court did not address the issue of pretext. [Pet. App. at 7 & 18] Rather, as the Fifth Circuit stated, its review of this fully-tried case was based on "whether the record ... contain[ed] evidence upon which a reasonable fact-finder would have concluded that Atkins proved by a preponderance of the evidence that Stemco intentionally discriminated against him on the basis of age when it discharged him." [Pet. App. at 7]

B. *As Found By The Fifth Circuit, The Evidence Overwhelmingly Demonstrated That Respondents Did Not Discriminate Against Atkins On The Basis Of Age.*

The undisputed evidence presented at the trial of this case reveals that Stemco eliminated Atkins' position and terminated Atkins' employment in connection with a reorganization that resulted in a company-wide reduction-in-force of 57% of the total employees. Likewise, it was undisputed that the significant financial losses suffered by Stemco for a two-year period were the reason for the reorganization. It

was undisputed that the Company completely eliminated its Sales Division, among other divisions and positions as part of its reorganization. It was undisputed that Atkins managed the sales division prior to the reorganization and that he had nothing to manage when his division was eliminated.

These undisputed facts gave rise to the Company's undisputed legitimate nondiscriminatory reason for Atkins' discharge: business necessities forced the Company to undergo a company-wide reduction-in-force that included eliminating the Company's Sales Division. [Rec. II at 13; Pet. App. at 7; Pet. App. at 14] With the elimination of the Company's Sales Division and with the Company's decision to discontinue direct sales for an indefinite period of time, there was no need for Atkins' job function. [Rec. II at 109; Pet. App. at 54] Atkins *never* disputed the fact that the Company's need for his position and efforts ended with the elimination

of the sales division.[2] Rather, he offered irrelevant and insignificant facts and "statistics" that he claims demonstrates that age was a determining factor in the decision to terminate his employment. Atkins offered these insignificant and irrelevant "facts" and "statistics" as evidence of discrimination notwithstanding that the reorganization completely eliminated the need for his employment and notwithstanding that he *never* identified another *available* position to which he claims he was qualified to fill.[3] [See generally the *Testimony of George David Atkins* at Rec. V at 31 *through* 79 & Rec. VI at 3 *through* 88]

The evidence offered by Atkins to support his claim of age discrimination can be summarized as

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2/ Atkins suggests that the Company should not have eliminated the sales division or resorted to relying on distributor sales instead of direct sales. [Pet. at 5] The ADEA, however, cannot be used to second guess business decisions. *Guthrie v. Tifco Indus.*, 941 F.2d 374, 378 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1267 (1992).

3/ Johns' position was not an available position in that the Company simply recalled Johns to perform the same job he had held prior to the reorganization.

follows: (i) the average age of the workforce decreased when the Company reduced its force from 40 employees to about 15 employees; (ii) the Company rehired or retained a 40-year old employee to work as a liaison between the Company and its distributors; and (iii) an executive, who did not select the employees to lay off, allegedly remarked that if *Atkins* were to purchase the Company, *Atkins* could save costs by eliminating the costlier older workers. [Pet. 3-10] None of this evidence was legally sufficient to support his claim that age, rather than business necessities, served as the reason for his termination.

C. ***Conclusion.***

In short, Atkins' Petition should be denied because: (i) the record fully supports the Fifth Circuit's judgment affirming the district court's judgment as a matter of law in favor of Respondents; and (ii) the Fifth Circuit's opinion in this case does not represent an application of any standard, pretext or otherwise, that diverges with the standards applied by the courts of appeals in other circuits.

REASONS WHY THE PETITION SHOULD BE DENIED

A. *Because The Fifth Circuit Did Not Apply A "Pretext Plus" Standard, This Case Fails To Present A Proper Basis For Addressing Any Alleged Split In Authority.*

Because this case was fully tried, the Fifth Circuit declined to review it from the standpoint of burden-shifting. [Pet. App. at 7] Rather, the Fifth Circuit stated that its job was "to determine whether the record before [it] contain[ed] evidence upon which a reasonable fact-finder could have concluded that Atkins proved by a preponderance of the evidence that Stemco intentionally discriminated against him on the basis of his age when it discharged him." [Pet. App. at 7] Having declined to review the case under a burden-shifting procedural device, the Fifth Circuit had no need to address the final step applied when using such a device: an analysis of pretext.

What the Fifth Circuit *did* do in this case is provide to the parties a description of the procedural burden-shifting steps applicable in Title VII and ADEA cases. [Pet. App. at 6-7] This background description of the burden-shifting steps, however, was provided by the

Fifth Circuit strictly as background information. [Id.] As part of this background discussion, the Fifth Circuit quoted the burden of proof placed on a plaintiff in a Title VII or ADEA case as set forth in *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S. Ct. 2742 (1993): " '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. at 2747[.]" [Pet. App. at 6-7]

The Fifth Circuit's background discussion included a quotation from its opinion in *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1993). *Bodenheimer* represented an appeal from a *summary judgment* in an ADEA case. In *Bodenheimer*, the Fifth Circuit interpreted *St. Mary's Honor Center v. Hicks* as requiring Title VII and ADEA plaintiffs to, "prove through a preponderance of the evidence, that the employer's reasons were not the true reason[s] for the employment decision *and* that unlawful discrimination was." [Pet. App. at 6-7 (emphasis in original)]

Having provided this background information, the Fifth Circuit stated that, like the district court, it would *assume* that Atkins satisfied his *prima facie* case.[4] [Pet. App. at 7 & 18] Moreover, the Fifth Circuit recognized that the Company "rebutted [Atkins'] inference by providing a legitimate nondiscriminatory reason for Atkins' discharge -- that is, restructuring because of the company's poor performance reflected by its increasing financial losses over a two-year period." [Pet. App. at 7]

The Fifth Circuit then announced that a fully-tried case such as this one need not be reviewed under a burden-shifting procedure. Consequently, the court reviewed the case to see "whether the record before [it] contain[ed] evidence upon which a reasonable fact-finder could have concluded that Atkins proved by a

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[4] Contrary to Atkins' assertion to this Court in footnote 2, page 13 of his Petition, neither the district court nor the Fifth Circuit found that Atkins satisfied his *prima facie* burden. Instead, the district court and the Fifth Circuit simply *assumed* for the purposes of their decisions that Atkins satisfied his *prima facie* case. [Pet. App. at 7 &18]

preponderance of the evidence that Stemco intentionally discriminated against him on the basis of his age when it discharged him." [Pet. App. at 7] In other words, the Fifth Circuit described the burden-shifting procedural devices applicable in Title VII and ADEA cases, but turned around and stated that such devices were unnecessary in this case because, unlike *Bodenheimer*, this case had been fully tried.

Notwithstanding the express and clear statement made by the Fifth Circuit that it would not review this case under a *St. Mary's* or *Bodenheimer* burden-shifting analysis, Atkins makes the remarkable claim that the Fifth Circuit did precisely that: that it evaluated the case using the *Bodenheimer* interpretation of *St. Mary's*. [Pet. at 10-11] The *Bodenheimer* interpretation of *St. Mary's*, according to Atkins, involved an improper application of a pretext plus standard. [Pet. at 11] Atkins further contends that *Bodenheimer* not only was a misapplication of *St. Mary's*, but that the Fifth Circuit's interpretation of *St. Mary's* in *Bodenheimer*

was rejected by courts of appeals in other circuits. [Pet. at 14-17]

Atkins' argument might leave room for some consideration except that he is not petitioning for a writ of certiorari in *Bodenheimer* -- he is seeking a writ in *his* (this) case. *Atkins'* case, moreover, does not involve the Fifth Circuit's application of the *Bodenheimer* interpretation of *St. Mary's*. At no point in the Fifth Circuit's opinion did the issues of *St. Mary's* or the *Bodenheimer* interpretation of *St. Mary's* ever come up -- that is, issues involving the credibility, or lack thereof, of Respondents' nondiscriminatory reasons for terminating Atkins' employment. At no point in time did the Fifth Circuit discuss or analyze this case from the standpoint of pretext or pretext plus -- it simply reviewed the entire record and concluded that "the evidence presented at trial overwhelmingly demonstrate[d] that the defendants did not discriminate against Atkins on the basis of age." [Pet. App. at 2]

That the Fifth Circuit quoted from and cited to *St. Mary's Honor Center* and *Bodenheimer* as part of its background discussion does not support Atkins' theory that the Fifth Circuit evaluated the evidence from the standpoint of *Bodenheimer's* interpretation of *St. Mary's*. *Bodenheimer* did not involve a fully tried case -- it involved an appeal from a *summary judgment* in an ADEA action. *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d at 956. An appeal from a summary judgment in an ADEA or Title VII action lends itself very well to a burden-shifting analysis, whereas an appeal from a fully-tried case is better reviewed from the standpoint of considering the entire record.

St. Mary's, moreover, involved a Title VII bench trial to a district court, where the district court concluded that a plaintiff's discharge was not racially motivated notwithstanding the district court's *express* finding that the reasons given by the employer for the discharge were not the real reasons for its termination of the plaintiff's employment. *St. Mary's Honor Center v. Hicks*, __ U.S. at __, 113 S.Ct. at 2748.

Unlike the Court in *St. Mary's*, the Fifth Circuit in this case was not faced with a situation where a trier of fact expressed disbelief of Respondents' legitimate nondiscriminatory reason for discharging Atkins. To the contrary, the district court found that "[Atkins'] indirect proof [of age discrimination] is barely enough to establish a *prima facie* case, and certainly [is] not enough to rebut Stemco's legitimate nondiscriminatory reasons for the reduction-in-force." [Pet. App. at 25] Moreover, the Fifth Circuit labeled Respondents' economic justifications for the layoff, "objective and undeniable."[5] [Pet. App. at 12]

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[5] Even if the Fifth Circuit had engaged in an unnecessary analysis under a burden-shifting approach, because it determined the Company's reasons for terminating Atkins were undeniable, the issue of whether to apply a standard of mere pretext as opposed to a pretext-plus standard never would have been reached. Moreover, regardless of how *St. Mary's* is interpreted, had the burden-shifting analysis been undertaken, Atkins was required to prove " 'that the [Company] intentionally discriminated against [Atkins] because of his [age].' " *St. Mary's Honor Center v. Hicks*, __ U.S. at __, 113 S. Ct. at 2749, *quoting Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093 (1981). And

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Atkins states, however, that the jury must have disbelieved Respondents' legitimate nondiscriminatory reasons for terminating Atkins' employment because it returned a verdict against Respondents. [Pet. at 13] If a jury's affirmative finding of discrimination amounts to conclusive evidence of pretext, Title VII and ADEA defendants may as well forfeit their appellate rights.

The fact is, because the district court and Fifth Circuit did not need to resort to a burden-shifting analysis in this case, the issues of pretext or pretext plus were not relevant to the analyses of these courts. One can rest assured, however, that had either court found reason to question the credibility or truthfulness

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> while proof of pretext together with the elements of a plaintiff's *prima facie* case may suffice to show intentional discrimination, a failure to prove pretext is fatal to a plaintiff's cause of action. *St. Mary's Honor Center v. Hicks*, __ U.S. at __, 113 S. Ct. at 2749. Under no circumstances, however, does proof of pretext alone compel a judgment for a plaintiff. *Id.* In this case, Atkins presented no legally sufficient evidence of pretext. Thus, even if the Fifth Circuit had engaged in a burden-shifting analysis, Atkins could derive no benefit from any inferences that this Court recognized in *St. Mary's*.

of Respondents' legitimate nondiscriminatory reason for terminating Atkins, such questions would have been added to the the courts' analyses of the evidence. Because there was no doubt as to the truth of Respondents' reason for terminating Atkins, credibility questions were raised or discussed. To be sure, a review of Atkins' Petition and of the record in the case reveal quite clearly his complete inability to dispute Respondents' reasons for his discharge.

B. *The Evidence Presented At Trial Overwhelmingly Demonstrated That Respondents Did Not Discriminate Against Atkins On The Basis Of Age.*

Even if the Fifth Circuit had engaged in the burden-shifting procedural device, the issue of whether to apply a "pretext plus" standard never would have been reached because Atkins simply did not have legally sufficient evidence of pretext. To be sure, the Company's legitimate nondiscriminatory reason for terminating Atkins was undisputed. It was undisputed that the Company suffered severe financial losses for the two-year period preceding Atkins' termination. [Rec. IV at 81-82, 86-88; DX 1; DX 2] It was undisputed

that the Company reduced its force by about 57% because of the financial losses. Eleven of the persons terminated were under the age of 40, and twelve of the persons terminated were over the age of 40. [DX 17; PX 85; PX 1; Rec. IV at 93] It was undisputed that the Company's Sales Division was eliminated and all eight members employed in the Sales Division, which Atkins managed, were discharged. [DX 17; PX 85; PX 1; Rec. IV at 100-101] It was undisputed that 50% of the terminated members of the Sales Division were over the age of 40, and 50% were under the age of 40. [Id.]

It was undisputed that the Company rehired only one member of the sales force, Chris Johns. [Rec. IV at 105] Johns, who was over the age of 40, was rehired not to engage in direct sales, which was Atkins' area of expertise, but to serve as a liaison between the Company and its distributors. [PX 85; Rec. IV at 70, 106] It is undisputed that Johns performed essentially the same job before the layoff as he performed after the

layoff.[6] [Rec. IV at 105-106] Atkins never claimed that he was clearly more qualified than Johns for Johns' position[7] [Pet. App. at 9], and it was undisputed that Johns was in fact clearly better qualified than Atkins to fill the role as a liaison between the Company and its

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6/ In his Petition, Atkins represents to this Court that Johns was retained to fill the position of "Distribution Sales Manager." [Pet. at 5] The record citations presented by Atkins to this Court do not support such a representation. Moreover, the record clearly reveals that Johns did not hold a title of manager, but was a salesman *to the distributors*. [Rec. IV at 105]

7/ Atkins does not argue that he was clearly better qualified than Johns for Johns' position. Atkins never even testified that he wanted Johns' position. Rather, Atkins contends that the retention of Johns represented further evidence of discrimination because Paul Norton, the Company's new President, was unfamiliar with Johns and Johns' background. Accordingly, Atkins surmises that Norton must have used age as the basis for his decision to retain Johns. Atkins fails to further explain to this Court, however, that the evidence reveals Norton made the decision to retain Johns based on a request of the Company's new Vice President and General Manager that Johns be retained. [Rec. IV at 102-105] This new Vice President and General Manager was familiar with and impressed by Johns' background and experience. Norton, moreover, had never met Johns and had no idea of Johns' age. [Rec. IV at 105]

distributors.[8] *Walther v. Lone Star Gas Co.*, 952 F.2d at 123 (evidence must show plaintiff *clearly* better qualified than younger employee who was retained -- "[t]he ADEA was not intended to be a vehicle for judicial second guessing of business decisions, nor was

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8/ The position to which Johns was retained to perform was limited to managing distributors. [Rec. IV at 56-57] Johns interfaced with the distributor groups who sold the *AutoCoach*. [Rec. IV at 57] The undisputed evidence revealed that Johns previously worked several years for a major distributor of the *AutoCoach* product line and that Johns had acquired considerable experience in marketing *AutoCoach* products during that period of time. [Rec. IV at 105-106; Rec. VI at 31-32, 48-52] Uncontroverted testimony also revealed that Johns possessed not only a thorough understanding of the distribution sales network, but of the *AutoCoach* product line. [Rec. IV at 102-105] Even Atkins agreed that Johns was one of the few people in the company who had worked for a distributor that had sold a lot of the *AutoCoach* products. [Rec. VI at 48-52]

Compare these qualifications to those of Atkins. Atkins joined Stemco only seven months before the company-wide reduction-in-force, and when he joined Stemco, he knew nothing about it or the *AutoCoach* product line. Moreover, Atkins had never worked for a distributor in this industry. [Rec. V at 74-75] Atkins never performed Johns' job, namely handling the distributor sales of the *AutoCoach* product line. [Id.] Atkins focused on direct sales throughout his entire career and testified that direct sales were his focus while he was employed at Stemco.

it intended to transform the courts into personnel managers.")

It was undisputed that the company-wide reduction-in-force resulted in the elimination not only of *all* employees in the Company's sales division, but of *all* employees in the Company's Finance Department. [Rec. IV at 94-95] This company-wide reduction-in-force also included the termination of *all* staff and management members in the Company's Manufacturing Division, and included several members of the Engineering Department. [Rec. IV. at 95-96, 97-98, 101]

Against these undisputed facts, all Atkins offers to support his claim of discrimination is second guessing and statistically insignificant comparisons of the workforce's age before and after the company-wide reduction. In this context, Atkins nitpicked at the Company's lists of terminated and retained employees. [Rec. IV at 27-28, 32, 39, 43, 46, 49, 67-70, 94, 111, 109; Rec. V at 7-10, 16, 65-66] This nitpicking takes the form, for instance, of Atkins complaining on the one

hand that Johns, who was over 40, was not included on the list of terminated employees,[9] yet on the other hand complaining that the rehiring of Johns within a day or so of the layoff represented evidence of age discrimination. [Rec. IV at 41, 43, 61-62; Rec. at 6-7] Atkins takes issue with the fact that an individual who was not an employee of Stemco, but of an affiliated company, was not included on the layoff list. [Rec. IV at 43-44] Atkins takes issue with the Company's decision to retain or rehire another employee under the age of 40 even though the employee had no association with the Sales Division.[10] [Rec. IV at 43]

9/ Atkins suggests that the Company failed to include Johns on the layoff list so as dishonestly to decrease the number of people over the age of 40 who were laid off. [Rec. IV at 41-42; Pet. App. at 33-35]

10/ In his Petition, Atkins claims that "several other younger employees were terminated and quickly rehired, specifically Chris Johns and Petra Rhode." [Pet. 4] Atkins fails to mention that Ms. Rhode was not an employee of the Sales Division. Other than Johns and Rhode, Atkins fails to identify any other "younger employee" whom the Company rehired. Moreover, Atkins fails to mention the fact that an "older" employee, who was a senior engineer, was also recalled or rehired.

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Even though all eight members of the sales division were laid off, 50% of whom were under the age of 40, and even though about 24 of the 40 members of the entire workforce were laid off (eleven of the twenty-four employees being under the age of 40), Atkins argues that it is statistically significant that the age of the workforce declined after the layoff. Atkins can only make such an argument by ignoring the following undisputed surrounding facts and circumstances: the Company eliminated entire divisions, including the division that Atkins managed; the Company eliminated 57% of its very small workforce;[11] the Company laid off

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[Rec. V at 63]

Even though Atkins considered it evidence of pretext when Johns' name was included on a list of those persons retained by the Company (because Johns was over the age of 40), Atkins found no problem including the name of another employee on the same list who was under the age of 40 and who, like Johns, had been rehired following her termination. [Rec. V at 59-60]

11/ Considering that 57% of the small workforce was laid off, leaving only 16 or so employees, it would have been nothing short of impossible for the

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all eight members of its sales division -- four of whom were over the age of 40 and four of whom were under the age of 40. The usefulness of statistics "depends on all of the surrounding facts and circumstances." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340, 97 S. Ct. 1843, 1856 (1977). The surrounding circumstances and undisputed facts in this case rendered Atkins' statistics meaningless and useless.

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> Company to have approached the layoff with maintenance of the employees' ages in mind. Stemco laid off *all* employees in its finance and sales divisions. To maintain the age of the workforce, should Stemco have retained the older members of sales and finance even though Stemco no longer had jobs for them to perform? Should Stemco have laid off its better engineers so as to preserve the age of the workforce if the better engineers were younger? Would it have made sense for Stemco to have retained management and staff in its manufacturing arm and discharge its needed assemblers simply to maintain the older age of its workforce? Atkins offers no solutions to these questions and never disputes the fact that Stemco had legitimate nondiscriminatory reasons for its 23 other layoffs -- only that *his* termination was discriminatory and the statistics "prove" it.

Atkins finally takes issue with a statement allegedly made by John Guffey, the Coltec Group President. According to Atkins, Guffey offered him the following advice: if Atkins and other members of Stemco's management were successful in buying Stemco, Atkins would need to reduce his negative cash flow, and one way of accomplishing that goal would be to "get rid of the older workers because they cost the most because they had the highest benefits, most wages."[12] [Rec. V at 51] Such a statement is not probative of age discrimination because it was not related to the decision to terminate *Atkins*.

Moreover, the evidence conclusively established that Stemco's President, Paul Norton, made the decision to eliminate the entire sales division. [Rec. IV at 100-101] It was Norton's decision that led to the discharge of Atkins, and the decision was made in response to financial conditions that were unrelated to any age-based characteristics of the individual

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12/ Before the reorganization, Atkins and other members of management discussed buying the Company.

members of the groups laid off. Atkins offered no evidence that Guffey played any role in deciding who was to be terminated, or that Norton, the person who made the layoff decisions, had any knowledge of Guffey's alleged statement.[13] Under the ADEA, the only determinative factor is the motivation of the person who made the termination decision. *See Guthrie*

13/ Atkins takes issue with an interrogatory answer in which Guffey and Norton were assigned credit for the layoff decisions. [Rec. IV at 100-101, 110, Pet. at 6-7] The interrogatory answer was verified by a corporate secretary. At trial, Norton explained very clearly that because Guffey was his boss, he sought Guffey's approval of Norton's reorganizational plan, which included the company-wide reduction-in-force. [Rec. IV at 100-101] There was no evidence that Guffey played any role, however, in deciding who was to be laid off. In fact, Norton testified unequivocally that Norton and Norton alone made the decisions as to who would stay and who would go. [Rec. IV at 100-101] Norton and Norton alone made the decision as to which divisions would stay and which would go. [Id.] Considering that Norton was the person who made the termination decisions, he knew best how the decisions were made, who was involved in the decisions, and the extent of each person's involvement in the decisions. There was nothing dishonest in Norton's explanation of his exclusive role in the termination decisions nor in his explanation of Guffey's role in approving the reorganizational plan, which included the company-wide reduction-in-force.

v. Tifco Indus., 941 F.2d at 379; *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1412 (7th Cir. 1984).

In addition, as the Fifth Circuit recognized, Guffey's alleged statement related to seniority -- not age. [Pet. App. at 11] Decisions based on seniority do not equate to age discrimination. *Williams v. General Motors Corp.*, 656 F.2d 120, 130 n.17 (5th Cir. Unit B 1981), *cert. denied*, 455 U. S. 943, 102 S. Ct. 1439 (1982). Because Atkins was hired only a few months before he was terminated as part of the Company reorganization, he could hardly claim to be a senior employee with the Company.

Finally, Atkins offers as "evidence" of pretext his claim that at the time of his termination, Guffey told him that the Company was closing. [Pet. at 12] Because the Company did not close, Atkins seems to suggest that the Company's stated reason for his termination was untrue. In other words, Atkins seems to be saying that he can define for the Company its legitimate nondiscriminatory reason for his

termination and then disprove the reason offered by him on behalf of the Company. Atkins cites no authority for this novel and very plaintiff-friendly idea, nor will he find any such support. At best, the alleged statement goes to Guffey's credibility. Considering that Guffey did not make the decisions concerning the layoffs, the alleged statement has no relevance.

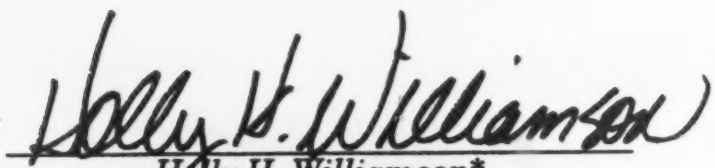
CONCLUSION

Atkins' attempt to mischaracterize this case as one in which the Fifth Circuit improperly applied a pretext plus standard fails for numerous reasons, not the least of which is the fact that the Fifth Circuit did not apply a pretext plus standard. Moreover, it is nothing short of incredible that Atkins would claim that his alleged showing of pretext was sufficient to create an inference of intentional age discrimination when the record reveals that Atkins never offered legally sufficient evidence from which even an inference of pretext could be drawn. The Company's legitimate nondiscriminatory reason for terminating Atkins' employment is undisputed -- financial problems

forced the Company to reduce dramatically its workforce. Thus, under any standard, the evidence "overwhelmingly demonstrate[d] that the defendants did not discriminate against Atkins on the basis of age." [Pet. App. at 2]

For these reasons, review of this case by the Court is not warranted and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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STEMCO, INC.**

PROOF OF SERVICE

Holly H. Williamson, Andrews & Kurth L.L.P., deposes and states that she served this Brief in Opposition to Writ of Certiorari on the Petitioner by enclosing three copies of each thereof in an envelope, certified mail, return receipt requested, addressed to:

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and by depositing same in the United States mail at Houston, Texas, on the *6th* day of *January, 1995.* Holly H. Williamson further deposes and states that all parties required to be served have been served.

Holly H. Williamson